80-6034

NO.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

EUGENE WILLIAM GALL, JR. PETITIONER

vs.

COMMONWEALTH OF KENTUCKY RESPONDENT

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The petitioner, Eugene William Gall, Jr., who is now held in the State Penitentiary at Eddyville, Kentucky, asks leave to file the attached Petition for a Writ of Certiorari to the Kentucky Supreme Court without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46.

The petitioner's affidavit in support of this motion is attached hereto.

Respectfully submitted,

Erwin W. Lewis

ERWIN W. LEWIS
ASSISTANT PUBLIC ADVOCATE
STATE OFFICE BUILDING ANNEX
FRANKFORT, KENTUCKY 40601

COUNSEL FOR PETITIONER

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EUGENE WILLIAM GALL, JR.,

Petitioner,

vs.

COMMONWEALTH OF KENTUCKY,

Respondent.

AFFIDAVIT

I, Eugene William Gall, Jr., being first duly sworn according to law, depose and say, in support of my motion for leave to proceed without being required to prepay costs of fees:

1. I am the petitioner in the above-entitled case.

2. Because of my poverty I am unable to pay the costs of said cause.

3. I am unable to give security for the same.

4. I am not employed. I have no other sources of income.

5. I have no savings accounts. I do not own any valuable property.

6. I am presently incarcerated at the Kentucky State Penitentiary at Eddyville, Kentucky.

Further the affiant saith not.

Eugene William Gall, Jr.
EUGENE WILLIAM GALL, JR.

Duly witnessed and sworn
to before me, a notary public,
this 16 day of October, 1980.

Notary Public, Commonwealth of Kentucky
My Commission expires: June 4, 1982

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OCTOBER TERM, 1980

EUGENE WILLIAM GALL, JR. PETITIONER

Supreme Court, U.S.
FILED
JAN 12 1981
MICHAEL RODAK, JR., CLERK

vs.

COMMONWEALTH OF KENTUCKY RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF KENTUCKY

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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January 12th, 1981

QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER A VENIREMAN MAY BE EXCLUDED FOR CAUSE IN A CAPITAL CASE DUE TO HIS STATEMENT THAT HE IS NOT SURE IF HE CAN VOTE TO IMPOSE THE DEATH PENALTY?

II.

WHETHER THE IMPROPER EXCLUSION OF A VENIREMAN FOR CAUSE UNDER WITHERSPOON V. ILLINOIS IS RENDERED HARMLESS BEYOND A REASONABLE DOUBT BY THE EXISTENCE OF ONE UNUSED PROSECUTORIAL PEREMPTORY CHALLENGE?

III.

WHETHER BLOOD, HEAD HAIR, PUBIC HAIR AND SALIVA SAMPLES CAN BE SEIZED FROM A DEFENDANT FOR TESTING TO DETERMINE IMMUTABLE CHARACTERISTICS BASED ONLY ON THE NON-FACTUAL REPRESENTATION THAT THEY WERE NEEDED TO COMPLETE THE INVESTIGATION OF A RAPE AND MURDER?

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

EUGENE WILLIAM GALL, JR. PETITIONER

vs.

COMMONWEALTH OF KENTUCKY RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF KENTUCKY

The petitioner, Eugene William Gall, prays that a writ of certiorari issue to review the judgment of the Kentucky Supreme Court issued on September 2, 1980 and modified on October 14, 1980.

OPINION BELOW

The opinion of the Kentucky Supreme Court was entered on September 2, 1980. The Court overruled a petition for rehearing, and modified the original opinion, on October 14, 1980. A "corrected page" was "issued" on December 9, 1980. Copies of the opinion and the modifications are attached as a part of the appendix.

JURISDICTION

The opinion of the Kentucky Supreme Court was entered on September 2, 1980. A timely petition for rehearing was overruled on October 14, 1980, with an order entered modifying the initial opinion. Mr. Justice Stewart extended the time for filing a petition for writ of certiorari to and including January 12, 1981. The jurisdiction of this Court is invoked under 28 USC §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

One of the constitutional provisions involved is the due process clause of the Fourteenth Amendment to United States Constitution, which provides, in part that, "...nor shall any

State deprive any person of life, liberty, or property, without due process of law...."

Also involved is the Sixth Amendment to the United States Constitution, which provides, in part, that "[i]n all criminal prosecutions the accused shall enjoy the right to... an impartial jury of the State...."

The final constitutional provision involved is the Fourth Amendment to the United States Constitution, which provides in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

STATEMENT OF THE CASE

Petitioner, Eugene William Gall, Jr., was arrested on the morning of April 5, 1978, on suspicion of having committed an armed robbery in a Gardnersville, Kentucky grocery store. On April 27, 1978, he was indicted by a Boone County grand jury for the April 5th murder of Lisa Jansen, a young girl (TR 1).

That same day, at arraignment, the Commonwealth moved to obtain physical samples of Gall's head and pubic hair, saliva, and blood (Transcript of the Arraignment 3-5; A 70-72; TR 5-6; A 66-67).

Two boilerplate affidavits were attached to the Commonwealth's motion (TR 19, 20; A 68, 69). The affidavit of Kentucky State Police Detective Jerry Keith stated three things: 1) the Commonwealth needs the samples "for purposes of completing their [sic] investigation into the alleged rape and death of Lisa Jansen"; 2) "the investigation and the ends of justice cannot be served without the above-mentioned items because of the nature of the alleged offenses of rape and murder," and 3) "the purpose of obtaining these items is not to harass or to intimidate the defendant." (TR 19; A 68). The affidavit of the Commonwealth Attorney was identical in wording to the Detective's. (TR 20; A 69).

At the hearing, the defense attorney objected because he did not believe "the Affidavits attached are sufficient under the law to impel the Commonwealth to some of these samples...." (Transcript

of Arraignment 4; A 71). The attorney for Gall had no objection to the taking of saliva, hair and fingerprint samples, but did have objections to blood sampling because the "Affidavits do not show a reason why that they would like these samples. There is nothing other than the fact that the reason is that they need the samples to complete their investigation. We don't believe that this is sufficient." (Transcript of Arraignment 5; A 72).

In response the Commonwealth Attorney stated, "the Commonwealth believes that no cause need be shown except they supply the Affidavits for the record. It is simply in the nature of physical evidence...." Id.

The trial judge granted the Commonwealth's requests. (TR 21-22; A 73-74).

Gall was tried during the third and fourth weeks of September, 1978. Because he was charged with a capital offense, the Commonwealth was allowed to exclude certain veniremen for cause due to their attitudes toward the death penalty. One of the persons excluded, toward the end of voir dire, was a man by the name of David Correll.

Correll stated, when first confronted with the fact that he was being considered as a juror in a death penalty case, that he thought he could "listen to the evidence and base [his] judgment on what [he heard] in the courtroom (TE 964; A 47). When asked if he had any feelings about recommending the penalty of death, he said "[n]ow religiously I might, yes" (TE 965; A 48). Correll was "not sure" if he agreed with the legislature's decision to pass a death penalty statute, nor was he sure if his "religious scruples" would prevent him from imposing the death penalty in any case (TE 966; A 49).

When asked if he was "open to the imposition of the death penalty, should the facts warrant it?", Correll stated, "Maybe, yes" (TE 967; A 50). He went on to say that his mind was not "closed" to the imposition of the death penalty, and that it was "very possible" that the death penalty would be appropriate in a heinous case (Id.). Correll assured the Court that he could follow the law as contained in the instructions (TE 968; A 51).

Notwithstanding these assurances, the Commonwealth's Attorney and the trial court continued to press Correll regarding

his feelings about the death penalty. Correll, throughout the latter portion of his voir dire, continued to display his ambiguity toward the ultimate punishment, stating at one point that "there might be situations where [he] might feel like "imposing the death penalty, and stating at another point that he was truly uncertain about his feelings" (TE 970-976; A 53-59). Finally, the trial court excluded Correll for cause (TE 976; A 59).

Gall was tried and convicted of murder by the jury, notwithstanding his plea of not guilty by reason of insanity. A presentence hearing was held following the verdict, after which the jury came back with a recommendation of death by electrocution (TE 2200). The trial court agreed with this recommendation, and sentenced Gall to death (TE 2208).

Gall appealed his conviction and sentence to the Kentucky Supreme Court. Among the issues raised to that Court were the improper exclusion of two jurors for cause due to their attitudes toward the death penalty, in violation of the Sixth and Fourteenth Amendments, and the improper seizure of body samples, in violation of the Fourth Amendment. Counsel supplemented Gall's original brief with, among other things, a briefing on this Court's decision in Adams v. Texas, ___ U.S. ____, 100 S.Ct. 2521 (1980).

The Kentucky Supreme Court affirmed Gall's final judgment on September 2, 1980, thereafter issuing the mandate and modifying its opinion on October 14, 1980. Gall v. Commonwealth, Ky., ____ S.W.2d ____ (1980) (A 1-41). With no explanation, a "corrected page" was issued by the Court on December 9, 1980 (A 43).

In its opinion, the Court held that David Correll's exclusion for cause was not a violation of this Court's decision in Witherspoon v. Illinois, 391 U.S. 510 (1968), and Adams v. Texas, supra, saying that "if a prospective juror will not say whether he can or cannot consider without prejudice the options from which he must choose in arriving at a verdict, he should be disqualified" Gall at 9 (A 9).

The Kentucky Supreme Court further considered the impact of this Court's ruling in Adams v. Texas. The Court held that Adams did not apply to the facts of the Gall case, stating that "[t]here is, however, a dispositive distinction, we feel, between a prospective juror who admits he may be affected by the death penalty, or does not know

whether he would or would not, and one who is unable to say even that he can consider that option. It is our opinion, therefore, that Adams does not apply to this case, and that Witherspoon does not require the acceptance of a juror who is unable to say that he can exercise an open-minded discretion with regard to the vital issues he will be called upon to decide." Gall at 11 (A 11).

The Court further held that because the Commonwealth had used only six of its seven peremptory challenges, that if Correll's exclusion was erroneous, that the error was harmless. "Surely, had the trial court denied its motion to strike Correll for cause, it would have used that challenge. Under similar circumstances the Supreme Court of Georgia held possible Witherspoon errors to have been harmless. Alderman v. State, Ga., 246 S.E.2d 642 (1978). See also State v. George, La., 346 So.2d 694 (1977). We reach the same conclusion in this case." Gall at 11-12 (A 11-12).

Finally, the Court reached Gall's Fourth Amendment claim, holding that:

> In this instance the trial court had before it an indictment charging Gall with the murder of Lisa Jansen and affidavits by the Commonwealth's Attorney and a detective of the Kentucky State Police stating that the physical samples were needed "for purposes of completing their investigation into the rape and death of Lisa Jansen." It seems to us that the relevance and importance of such evidence in a case involving rape are self-evident. We therefore hold that the order granting permission to obtain it from Gall's person was reasonable and was a valid basis for the subsequent admission of testimony derived from its analysis. Cf. Thompkins v. State, Ind., 383 N.E.2d 347, 351 (1979).
> Gall at 5 (A 5) (Emphasis added).

REASONS FOR GRANTING WRIT

I.

THE DECISION BELOW HOLDING THAT AN UNCERTAIN VENIREMAN MAY BE EXCLUDED FOR CAUSE CONFLICTS WITH PREVIOUS DECISIONS OF THIS COURT.

Since 1968, this Court has made it clear under what circumstances a venireman may be excluded for cause due to his feelings about the death penalty. The only veniremen who may be excluded are:

> ...those who made unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt. Witherspoon v. Illinois, 391 U.S. 510, 522 n.21 (1968).

This two-pronged test has been applied consistently by this Court in subsequent cases. Boulden v. Holman, 394 U.S. 478 (1969); Maxwell v. Bishop, 398 U.S. 262 (1970); Davis v. Georgia, 429 U.S. 122 (1976); Adams v. Texas, ___ U.S. ____, 100 S.Ct 2521 (1980).

The touchstone of this history of case law is that the venireman make it "unmistakably clear" that his opposition to capital punishment reaches the prohibited level. In the instant case, however, the Kentucky Supreme Court has abandoned the "unmistakably clear" standard established by this Court. In its place, the Kentucky Supreme Court has held that a venireman may be excluded where he is unsure how he feels about the death penalty.[1]

> It occurs to us that if a prospective juror will not say whether he can or cannot consider without prejudice the options from which he must choose in arriving at a verdict, he should be disqualified... [T]he effect of such equivocation is that on this important issue the juror will not give an assurance that he is able to exercise any discretion because he is not sure that his mind is open at the beginning. Gall at 9 (A 9).

This Court should grant this petition for a writ of certiorari to clarify what is obviously a deep conflict between this Court's decisions and the decision by the Kentucky Supreme Court. This Court should grant review in order either to reaffirm the standard established in Witherspoon v. Illinois of requiring

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[1] It should be noted that the venireman involved in this case, David Correll, went no further in his opposition to capital punishment than equivocation and uncertainty. Indeed, at various places in the voir dire, Correll made it clear that his uncertainty would not keep him from considering capital punishment. For example, he answered "Maybe, yes" to the question of "are you open to the imposition of the death penalty, should the facts warrant it?" (TE 967; A 50). When asked, "Is your mind in any way closed to the imposition of the death penalty?", Correll answered, "No, I would say it isn't closed, but it - I am just undecided" (Id.). The entire transcript of Correll's voir dire is included in the appendix. (A 44-59).

unmistakable clarity of the venireman's opposition to capital punishment prior to exclusion for cause, or to broaden the basis for exclusion to uncertainty about the death penalty as did the Kentucky Supreme Court.[2]

The conflict created by the Kentucky Supreme Court is further revealed not only in changing the "unmistakable clarity" standard to include that of the uncertain venireman. It is also apparent in the Kentucky Supreme Court's treatment of Adams v. Texas, ___ U.S. ____, 100 S.Ct. 2521 (1980). In Adams v. Texas, this Court rejected an attempt to construct an additional qualification for jurors in capital cases. This Court held that Texas could not go beyond the test erected in Witherspoon v. Illinois.

The Kentucky Supreme Court, in a rather subtle way, has attempted to follow the Texas lead. They have held that to be a juror in a capital case the venireman must affirmatively state that he can impose the death penalty, erecting a test for juror qualification, as opposed to Witherspoon's test of juror exclusion. This is a state standard broader than that established in Witherspoon v. Illinois, and is thereby directly in conflict with this Court's decision in Adams v. Texas.

In summary, the Kentucky Supreme Court has held that an uncertain juror may be excluded for cause in a capital case. This holding conflicts with a line of prior decisions of this Court allowing only those jurors who state their opposition to capital punishment with unmistakable clarity to be excluded for cause. Further, the holding of the Kentucky Supreme Court conflicts with Adams v. Texas, ___ U.S. ____, 100 S.Ct. 2521 (1980) by erecting

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[2]This Court has never ruled specifically that an uncertain venireman cannot be excluded for cause under Witherspoon v. Illinois. However, in a number of cases this Court has had this precise issue before it and has reversed the lower court in summary fashion. The clearest example occurred in State v. Mathis, 52 N.J. 238, 245 A.2d 20 (1968), rev'd, 403 U.S. 946 (1971). There, one of three veniremen discussed by the Court stated when asked if he could vote to impose the death penalty that "I can't definitely say I could or I couldn't." State v. Mathis, 245 A.2d at 26. This Court reversed. See also Ladetto v. Commonwealth, 356 Mass. 541, 254 N.E.2d 415 (1969), rev'd. 403 U.S. 947 (1971), and State v. Adams, 76 Wash. 2d 650, 458 P.2d 558 (1969), rev'd. 403 U.S. 947 (1971).

a state standard of jury exclusion that is broader than the constitutional standard erected in Witherspoon v. Illinois. Accordingly, this Court should grant this petition for a writ of certiorari to the Kentucky Supreme Court.

II.

THE DECISION BELOW HOLDING THAT AN UNCERTAIN VENIREMAN MAY BE EXCLUDED FOR CAUSE CONFLICTS WITH THE DECISIONS OF OTHER STATE COURTS OF LAST RESORT.

State courts other than Kentucky's have remained consistent with this Court's holding in Witherspoon v. Illinois, 391 U.S. 510 (1968). In People v. Goodridge, 76 Cal. Rptr. 421, 452 P.2d 637 (1969), a venireman was asked whether her opposition to capital punishment would disable her from rendering a verdict. The venireman responded, "'I really don't know. I'm on the fence. I just don't know. I have never had to make a decision like this before, and it is bothering me'". People v. Goodridge, 452 P.2d at 647. The Court held that "[s]uch a response clearly does not indicate that she could never vote to impose the death penalty no matter what the facts of the case might reveal. Much more in the way of an expression of opposition to the death penalty would be required from Mrs. Freeman for us to sustain her dismissal from the jury for cause." Id., at 647. A similar result has been reached in at least two other state courts. State v. Monk, 286 N.C. 509, 212 S.E.2d 125 (1975); People v. Washington, 80 Cal. Rptr. 567, 458 P.2d 479 (1969).

The Kentucky Supreme Court decision, however, is consistent with the decisions of other state's appellate courts. State v. Ross, La., 343 So.2d 722 (1977); Williams v. State, Fla., 228 So.2d 377 (1969), vac., 408 U.S. 941 (1972); Alderman v. State, 241 Ga. 496, 246 S.E.2d 642 (1978), cert. den. ____ U.S. ___, 99 S.Ct. 593 (1978).[3]

This Court should review the decision of the Kentucky Supreme Court due to the directly conflicting holdings of the

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[3]In September, 1980, the United States Federal District Court for the Southern District of Georgia granted a petition for the writ of habeas corpus. Alderman v. Austin, ____ F. Supp. _____ (S.D.Ga. 1980).

different state courts of last resort on this precise interpretation of Witherspoon v. Illinois. As long as this Court has not specifically treated this precise issue, this disparity between state appellate courts can be expected to continue. Jury selection in capital cases is too important to permit a variance on this Court's unambigious holding.

III.

THE DECISION BELOW HOLDING THAT AN UNUSED PROSECUTORIAL PEREMPTORY CHALLENGE RENDERS A WITHERSPOON VIOLATION HARMLESS ERROR INDIRECTLY CONFLICTS WITH PRIOR DECISIONS OF THIS COURT.

The Kentucky Supreme Court resorted to an alternative holding regarding the exclusion of the venireman, David Correll. It stated:

> It will be recalled that the Commonwealth left one of its peremptory challenges unexercised. Surely, had the trial court denied its motion to strike Correll for cause, it would have used that challenge. Under similar circumstances the Supreme Court of Georgia held possible Witherspoon errors to have been harmless. Alderman v. State, Ga., 246 S.E.2d 642 (1978). See also State v. George, La., 346 So.2d 694 (1977). We reach the same conclusion in this case.
> Gall at 11-12 (A 11-12).

This Court has never rendered a decision squarely in conflict with the holding of the Kentucky Supreme Court. However, there have been many summary reversals by this Court where the state court below held any Witherspoon error to have been harmless due to the existence of unexercised peremptory challenges in the hands of the prosecution. Whan v. State, Tex., 438 S.W.2d 918 (1969), rev'd., 403 U.S. 946 (1971); People v. Speck, 41 Ill. 2d 177, 242 N.E.2d 208 (1968), rev'd. 403 U.S. 946 (1971); State v. Mathis, 52 N.J. 238, 245 A.2d 20 (1968), rev'd, 403 U.S. 946 (1971); State v. Adams, 7 Wash. 2d 650, 458 P.2d 558 (1969), rev'd., 403 U.S. 947 (1971); State v. Wigglesworth, 18 Ohio St. 2d 171, 248 N.E.2d 607 (1969), rev'd., 403 U.S. 947 (1971). These decisions indicate indirectly that the Kentucky Supreme Court's decision is not consistent with this Court's interpretation of Witherspoon v. Illinois.

Further, in this Court's decision in Davis v. Georgia, 429 U.S. 122, 123 (1976) (Rehnquist, J., dissenting), it is noted

that in that case it is "unclear whether the state was entitled to another peremptory challenge." Notwithstanding that fact, this Court reversed the death sentence based upon a violation of Witherspoon. This reversal caused the dissent to observe that that case establishes a "per se rule that precludes application of even the harmless error test of Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)." 429 U.S. at 123.

Admittedly, neither Davis v. Georgia nor the summary reversals noted above establish weighty authority that the harmless error analysis is inapplicable to a Witherspoon violation. Yet, whatever meaning can be rendered from these actions indicate that this Court has not been receptive to the harmless error rule as applied to Witherspoon violations.[4] Because the decision below is in conflict with this implicit attitude, this Court should review the decision of the Kentucky Supreme Court.

IV.

THE DECISION BELOW HOLDING THAT AN UNUSED PROSECUTORIAL PEREMPTORY CHALLENGE RENDERS A WITHERSPOON VIOLATION HARMLESS ERROR CONFLICTS WITH A NUMBER OF PRIOR DECISIONS OF OTHER STATE COURTS OF LAST RESORT.

A number of state appellate courts have ruled contrary to the Kentucky Supreme Court's decision holding that an unused prosecutorial peremptory challenge renders a Witherspoon violation harmless beyond a reasonable doubt.

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[4]Three lower federal courts apparently agree with this analysis of this Court's decision. Barlow v. Wainwright, 323 F.Supp. 829 (N.D. Fla. 1971) stated that the use of the harmless error analysis "overlooks the very design of Witherspoon which proscribes exclusion of a venireman for cause if he is opposed to capital punishment... This Court will not join in this kind of imprecise speculation and in nowise intimates any view as to the correctness of that argument." Id., at 832. The Fifth Circuit's case of Burns v. Estelle, 592 F.2d 1297 (5th Cir. 1979), aff'd en banc 626 F.2d 396 (5th Cir. 1980) does not deal directly with the harmless error problem. However, the Court does note in the opinion that the "state used only 13 of its 15 peremptory challenges." Finally in reviewing Alderman v. State, 241 Ga. 496, 246 S.E.2d 642 (1978), cert. den. 439 U.S. 991 (1978), reh. den. 439 U.S. 1122 (1979), on habeas corpus, the United States District Court for the Southern District of Georgia rejected the Georgia Supreme Court's analysis finding a Witherspoon violation to be harmless when the prosecution has unused peremptory challenges. "[T]his Court must note that the State's argument cannot amount to more than mere supposition. Witherspoon, of course, requires that exclusions be based on the unambiguous and explicit, not a mere hypothesis that the prosecutor would use his challenges because to do otherwise would have been unwise or unlikely." Alderman v. Austin, ___ F. Supp. ____ (S. D. Ga. 1980).

In In Re Anderson, 73 Cal. Rptr. 21, 447 P.2d 117 (1968), the California Supreme Court states that while Witherspoon v. Illinois itself says nothing about this question, that "the broad language of the opinion establishes without doubt that in no case can a defendant be put to death where a venireman was excused for cause solely on the ground he was conscientiously opposed to the death penalty" notwithstanding the presence of unused prosecutorial peremptory challenges." In Re Anderson, 447 P.2d at 122. This holding was recently reaffirmed by the California Supreme Court in People v. Velasquez, 102 Cal. Rptr. 306, 606 P.2d 341 (1980), vac. ____ U.S. ____, 65 L.Ed.2d 1132 (1980).

The same decision was reached on September 17, 1980 in Pierson v. State, Tex., ___ S.W.2d ____ (1980). There, the Court rejected the state's harmless error argument, among other reasons, because "it would be pure speculation on our part."

This Court should review this question due to the irreconciliable differences between the appellate courts of different states on this vital constitutional matter.

V.

THE QUESTION OF WHETHER AN UNUSED PROSECUTORIAL PEREMPTORY CHALLENGE IS HARMLESS IS ONE OF VITAL IMPORT TO THE ADMINISTRATION OF JUSTICE IN THE STATES.

Petitioner submits that review and final settlement of this question by this Court is warranted due to its importance to the states' criminal justice systems. This is so because prosecutors in states adopting the harmless error rule can be expected to begin reserving peremptory challenges in capital cases in order to thwart any future judicial finding of a Witherspoon violation.[5] Such action would inhibit this Court's efforts to enforce its decision in Witherspoon, and would further threaten the integrity of the prosecution of cases throughout the many states where capital punishment is now a reality.

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[5]This is not a cynical or unwarranted prediction. Following the Kentucky Supreme Court's ruling in the instant case, petitioner filed a petition for rehearing. In that petition, the Court was reminded that prosecutors would in the future save peremptory challenges in capital cases to trigger the harmless error rule. The petition for rehearing was denied. Only a short time later, petitioner became aware that prosecutors all across Kentucky were being told by the Attorney General's office to save a peremptory challenge in capital cases. An Assistant Attorney General's memorandum to this effect was attached to a motion to supplement the record filed in the Kentucky Supreme Court. This motion was denied. The memorandum, however, has been made a part of the appendix attached to this petition. (A 60-65).

Further, unless this Court decides this question, unnecessary ambiguity will have been injected into the selection of jurors in capital cases. While no one would seriously contend that Witherspoon is a simple matter to interpret at the trial level, allowing the harmless error rule to attach to "death-qualifying" jurors would only further complicate matters. This Court has admirably enforced the two prongs of the Witherspoon test over the past decade. Trial courts need to know that the established clarity of Witherspoon is not now to be muddied by appellate decisions finding ways around the requirements of Witherspoon. For these reasons, petitioner urges this Court to review this question.

VI.

THE DECISION BELOW, HOLDING THAT THE RELEVANCE AND IMPORTANCE OF THE PHYSICAL SAMPLES WERE SELF-EVIDENT AND THEREFORE PROPERLY SEIZED, CONFLICTS WITH THE PREVIOUS DECISIONS OF THIS COURT.

There is no dispute that upon a proper factual showing it is constitutional to "extract" blood, saliva, head and pubic hair samples.[6] Schmerber v. California, 384 U.S. 757 (1966). Absent evanescent evidence, a search which intrudes beyond the surface of the body can only be conducted when there is a factual demonstration that there is a "clear indication" that the evidence will be found:

> The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search.
> Id. at 769-770, 86 S.Ct. at 1835.

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[6]Even though defense counsel objected to the seizure of only the blood of Eugene Gall, the impropriety of the seizure of the hair and saliva samples is reviewable by this Court even under Wainwright v. Sykes, 433 U.S. 72 (1972) restrictions since this is a capital case and Kentucky has a recognized exception to the contemporaneous objection rule for cases in which the sentence is death. Miller v. North Carolina, 583 F.2d 701, 705 (4th Cir. 1978); Smith v. Commonwealth, 290 S.W.2d 814 (Ky. 1956); Bowman v. Commonwealth, 290 S.W.2d 814 (1956); Edwards v. Commonwealth, 182 S.W.2d 948 (Ky. 1944).

Since the characteristics of the blood, hair and saliva samples for which the prosecution desired to test in this case are not subject to change or disappearance, there had to be a proper factual showing to allow their extraction under a warrant or judicial order.

The supporting affidavits did not show "a clear indication that in fact such evidence will be found" Id. The affidavits of the Detective and the Commonwealth Attorney stating that the samples were needed for purposes of completing their investigation failed to make any factual showing at all, let alone a factual showing meeting the Schmerber "clear indication" standard.

Not one fact, not one "underlying circumstance" was recited in the affidavits. Without such detailing of the factual circumstances, the court cannot perform its detached function. United States v. Ventresca, 380 U.S. 102, 108-09 (1965).

Contrary to the determination of the Kentucky Supreme Court in this case, Gall at 5 (A 5), the existence of an indictment does not supply the required factual showing to justify the seizure of blood, hair and saliva samples:

> While the existence of the indictments in this case might as a matter of law furnish probable cause to believe that on May 13, 1971 the Fidelity Bank of Folcroft was robbed by two men with handguns, and that defendants were those two men, it nowhere establishes that the requested blood, hair or X-rays are evidence of that crime. This must be done by affidavit before a warrant can issue. The Government's motion as drafted contains only conclusory allegations of insufficient detail to establish probable cause. It is based entirely on heresay but contains no surrounding facts and circumstances from which the conclusions given were drawn, and no chain of information establishing the source of the information or the reliability of that source.
> United States v. Allen, 337 F.Supp. 1041, 1044 (E.D. Pa. 1972).

The use of the indictment to supply the factual basis for the affidavit would be in violation of the defendant's constitutional presumption of innocence, Taylor v. Kentucky, 436 U.S. 478 (1978), guaranteed him prior to trial. Cf. United States v. Haskins, 345 F.2d 111, 114 (6th Cir. 1965).

The affidavits did not set forth particular facts and circumstances to demonstrate probable cause and to allow the

magistrate to make an independent evaluation. See Franks v. Delaware, 438 U.S. 154, 165 (1978); Spinelli v. United States, 393 U.S. 410 (1969); Anguilar v. Texas, 378 U.S. 108 (1964).

Because the Supreme Court of Kentucky's ruling is in conflict with the applicable constitutional holdings of this Court, review should be granted.

VII.

THE DECISION BELOW, HOLDING THAT THE RELEVANCE AND IMPORTANCE OF THE PHYSICAL SAMPLES WERE SELF-EVIDENT AND THEREFORE PROPERLY SEIZED, CONFLICTS WITH THE DECISIONS OF OTHER COURTS.

Federal and state courts other than Kentucky have determined that, absent a proper factual showing, the seizure of physical samples which intrude beyond the surface of the body and which have immutable characteristics is a violation of the fourth amendment in line with this Court's holding in Schmerber v. California, 384 U.S. 757 (1966).

In United States v. Allen, 337 F. Supp. 1041 (E.D. Pa. 1972) the Court held that the motion to obtain body samples of the defendant was insufficient because if failed to satisfy the fourth amendment requirements of a sufficient factual demonstration for the issuance of the warrant. Id. at 1044.

In Mills v. State, 345 A.2d 127 (Md.Ct.Sp.Ap. 1975) aff'd. 363 A.2d 491 (Md.Ct.App. 1976) the state requested prior to trial to have a sample of the defendant's blood since "in order...to go forward with certain evidence...it is necessary to obtain a blood sample from the defendant to determine his blood group....as necessary corroboration to other scientific evidence." Id. at 129. The sample was ordered taken. While the case was affirmed because appellant first brought the matter out on cross-examination, the Court held that the withdrawal of the blood was "...violative of the appellant's constitutional rights...." Id. at 132.

There were sufficient facts to support a finding of probable cause detailed in the prosecutor's affidavit to make the seizure of the hair and blood samples constitutional in People v. Marshall, 244 N.W.2d 451, 458 (Mich. Ct.App. 1976). The facts set out in the affidavit included: strands of hair were found on the night clothes of one of the victims, not belonging to any of the victims, which tests disclosed as relaxed Afro hair; defendant

spent much time at a particular barber shop which performed this hair process; the suspect was left-handed, no forced entry into the house was made; that the suspect had a history of assaultive behavior; the defendant's statements of being at home at the time of crime were false; and the defendant was the son of the victim. Id. at 453, 458.

The particularized factual showing of the prosecution's affidavit in Marshall was wholly absent from the Commonwealth's affidavits in Gall's case. See also 2 LaFave, Search and Seizure, §4.1(d)(1978).

This Court should review this error because of the conflict between Kentucky authority and that of other jurisdictions, and because of the critical nature of this type of evidence in a capital case of totally circumstantial evidence.

VIII.

THE DECISION BY THE KENTUCKY SUPREME COURT DETERMINING THAT THE BODY SAMPLES WERE PROPERLY SEIZED SHOULD BE REVIEWED BY THIS COURT BECAUSE OF THE LIMITATIONS OF HABEAS REVIEW IN FEDERAL COURTS DUE TO STONE V. POWELL.

The Kentucky Supreme Court determined that the blood sample was properly seized. This Court should review this determination in this capital case because other federal forums are closed to Eugene Gall under Stone v. Powell, 428 U.S. 465 (1976). The Kentucky Supreme Court did not determine whether the saliva and hair samples were properly seized because there was no objection to this action by the trial defense counsel. This Court should substantively review these seizures since otherwise substantive review is foreclosed to petitioner.[7]

Defense counsel failed to use the opportunity to litigate all of petitioner's fourth amendment claims in the state trial court. They were litigated at the state appellate level. Under

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[7]This argument is viable only should this Court discount petitioner's position that this error is reviewable absent traditional preservation because of Kentucky's exception for capital cases. See Argument V, supra, fn.1.

Stone v. Powell, 428 U.S. 465 (1976) petitioner is precluded from federal review except by this Court. "The remedy for error in the state courts is by way of writ of certiorari to the Supreme Court of the United States." United States ex rel Maxey v. Morris, 591 F.2d 386, 389-390 (7th Cir. 1979); see also Duncantell v. Texas, 439 U.S. 1032, (1978) (Brennan, J. dissenting); Mincey v. Arizona, 437 U.S. 385 (1978) (Marshall, J. concurring); Stone, supra, 428 U.S. 495, n.38.

Stone is grounded on two basic positions: 1) state courts will competently consider and protect federal constitutional rights, and 2) the cost of the exclusionary rule outweighs its benefits.

These two policy considerations are not applicable to petitioner's case since in Stone the prisoners did receive review by the state court. Here petitioner has not received review on three aspects of his error. "The authoritative view remains that it is worth the social costs for law enforcement officers to know that someone will measure their behavior against the fourth amendment." O'Berry v. Wainwright, 546 F.2d 1204, 1221 (5th Cir. 1977) (Goldberg, J., dissenting).

The Kentucky Supreme Court, according to one of its own members, has yet to become particularly sensitive to the fourth amendment claims presented to it. Collins v. Commonwealth, Ky., 574 S.W.2d 296, 298, n. 1 (1978) (Lukowsky, J., dissenting); see also Rawlings v. Commonwealth, Ky., 581 S.W.2d 348, 351 n.6 (1979) (Lukowsky, J., dissenting). Furthermore, the appellate courts of Kentucky are given no incentive to become more sensitive with respect to a fourth amendment violation due to this Court's decision in Wainwright. Cf. Relford v. Commonwealth, Ky.App., 558 S.W.2d 175 (1977); dis. rev. improvidently granted, 556 S.W.2d 154 (1978).

Without review by this Court, where is the one level of enforcement of the exclusionary rule which Stone concludes necessary for society to foster? The Kentucky Supreme Court refused to review every aspect of this fourth amendment claim. This Court must review this issue since it conflicts with a prior decision of this Court, since it is of considerable importance to the administration of criminal justice, since there may be no other federal forum, and since this is a capital case with its conviction and sentence resting

solely on circumstantial evidence.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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NO. 80-6034

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

EUGENE WILLIAM GALL, JR. PETITIONER

Supreme Court, U.S.
FILED
JAN 12 1981
MICHAEL RODAK, JR., CLERK

vs.

COMMONWEALTH OF KENTUCKY RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF KENTUCKY

APPENDIX

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APPENDIX

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Supreme Court of Kentucky

79-SC-29-MR

EUGENE WILLIAM GALL, JR. — APPELLANT

V.

APPEAL FROM BOONE CIRCUIT COURT
HONORABLE SAMUEL NEACE, JUDGE
NO. 78-CR-097

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION OF THE COURT

AFFIRMING

Eugene W. Gall, Jr., was convicted of murder and sentenced to death pursuant to the verdict of a jury under the two-stage trial procedure prescribed by KRS 532.025. In this appeal he advances many alleged errors and irregularities, contending that each and all of them require a reversal of the judgment. We shall limit our discussion to those we do not consider to be patently groundless.

FACTUAL BACKGROUND

At about 7:35 a.m. on April 5, 1978, Lisa Jansen, a 12-year-old schoolgirl, left her home in suburban Cincinnati, Ohio, for school. She was missed very shortly thereafter when she failed to arrive at the home of a friend she had planned to meet on the way and it was ascertained that she had not gone directly to school. At about 9:25 a.m. that morning Mrs. Connie Puckett, while driving her automobile along Kentucky Highway 16 from Verona,

Kentucky, toward her home in Walton, Kentucky, noticed a red jacket lying on the side of the highway near the intersection of Stephenson-Mill Road. She stopped and retrieved it, thinking that probably it belonged to one of the students attending the elementary school at Verona. She was positive that the jacket had not been there when she passed the same place a few minutes earlier on her way to Verona. Upon resuming her trip homeward she observed an open schoolbook lying in the road, stopped and picked it up. It bore the name of Lisa Jansen, and when Mrs. Puckett arrived back in Walton she telephoned the school at Verona. The school principal advised her that no one by the name of Lisa Jansen was enrolled there, but later in the day he called back and told Mrs. Puckett that a television newscast had reported a Lisa Jansen as missing. Mrs. Puckett then reported her discovery of the jacket and schoolbook to the Cincinnati police.

The distance from Lisa's home in Ohio to the Kentucky state line at Cincinnati was 10.9 miles, and from the state line southward via Interstate 75 to the place near Stephenson-Mill Road where her body was found the next morning is 22.6 miles. Gall resided at Hillsboro, Ohio, about 45 miles the other side of the Jansen home.

At about 10:15 a.m. on April 5, 1978, a man later identified as the appellant, Gall, entered a small grocery store at the crossroads village of Gardnersville, 17 miles or so by public roads from the vicinity of Stephenson-Mill Road (which consists of a loop leading off and then back to Highway 16), and robbed the storekeeper and her customers at the point of a .357-gauge magnum stainless-steel revolver. The storekeeper, who was familiar with this type of weapon, observed from the exposed portions of

the magazine that it was loaded with hollow-point cartridges. As soon as the robber left, she telephoned the local headquarters of the Kentucky State Police and reported the incident. Within a matter of minutes Gall was encountered by Detective Joe Whelan, who turned around and followed, and then by Trooper Gary Carey, who had alighted from his cruiser and was attempting to block the highway. As Carey signalled the driver to halt Gall shot him once, got out of the Ford and shot him again, and then sped onward with Whelan emptying his gun into the rear of the fleeing car. Almost immediately other police officers took up the chase, and Gall was finally brought to bay when he attempted to make a U-turn in the town of Dry Ridge and one of the troopers rammed his cruiser into the Ford. The .357 revolver was lying on the floor of the Ford. Also on the floorboard of the Ford automobile the officer found a cigar box and $112.88, the money taken at the store in Gardnersville. Gall had the further sum of $42.84 on his person. Subsequent laboratory tests established that a bullet removed from Trooper Carey's person had been fired from the revolver found in Gall's automobile.

Shortly following his arrest Gall, by reason of his police record, became a suspect in connection with the disappearance of Lisa Jansen. In 1970 he had been charged with several counts of rape and armed robbery in southern Ohio, had been found mentally incompetent to stand trial, and had spent some 19 months in a mental institution at Lima, Ohio, after which he entered a plea of guilty to those charges and spent five years in a state penitentiary at Lebanon, Ohio. He was 31 years of age at the time of Lisa Jansen's murder.

PRETRIAL PROCEEDINGS

Lisa's body was found early on the morning of April 6, 1978. Gall, already under arrest, was charged with her murder and was indicted for that offense by the Boone County grand jury on April 27, 1978. At his arraignment on the same day, and following a plea of not guilty, the trial court granted the Commonwealth's motion for permission to procure various physical samples from Gall's person, including hair, saliva, fingerprints and blood. Counsel for Gall objected only with respect to blood sample, stating that he had no objection as to the hair, saliva and fingerprints. Thus we consider only the matter of the blood sample.

The Commonwealth's motion for permission to obtain these samples was supported by affidavits of the prosecuting attorney and a detective of the Kentucky State Police.

A divided court in Schmerber v. California, 384 U.S. 757 (1966), held it permissible for a police officer acting with probable cause under exigent circumstances to have a blood sample taken by a physician from an arrested drunk-driving suspect. The 5th Amendment protection against self-incrimination was held inapplicable because the majority of the court did not consider a surrender of blood as having testimonial import. 384 U.S. at p. 765. The 4th and 14th Amendment protection against unreasonable search and seizure did apply, but was held not to have been violated. In the absence, however, of exigent circumstances justifying immediate action without a warrant, the court indicated that the same precautions would be required as in the instance of a search warrant. That is, the justification must be determined by an informed, detached and deliberate judicial act. 384 U.S. at p. 770.

In this instance the trial court had before it an indictment charging Gall with the murder of Lisa Jansen and affidavits by the Commonwealth's Attorney and a detective of the Kentucky State Police stating that the physical samples were needed "for purposes of completing their investigation into the rape and death of Lisa Jansen." It seems to us that the relevance and importance of such evidence in a case involving rape are self-evident. We therefore hold that the order granting permission to obtain it from Gall's person was reasonable and was a valid basis for the subsequent admission of testimony derived from its analysis. Cf. Thompkins v. State, Ind., 383 N.E.2d 347, 351 (1979).

Also on the day of the arraignment the trial court, by agreement of the parties, appointed Dr. Robert Noelker, a psychologist, to examine Gall for the purpose of determining (a) whether he was mentally competent to stand trial and (b) whether at the time of the offense he had the mental capacity to appreciate the criminality of his conduct and to conform his conduct to the law. Contemporaneously the Commonwealth secured the services of Dr. Lee Chutkow, a psychiatrist, for the same purpose. A hearing on the first of these questions was held on May 26, 1978, following which the court found Gall to be competent and set the case for trial on the merits.

On September 6, 1978, defense counsel moved for a change of venue on the ground that by reason of local publicity Gall could not be given a fair trial in Boone County or in any of the surrounding northern-Kentucky counties. We have examined the affidavits, counteraffidavits and exhibits (numerous newspaper articles) filed in connection with this motion and are of the opinion that the trial court did not abuse its discretion in declining a change of venue.

Gall cites several U. S. Supreme Court cases in which state court convictions were overturned because the "trial atmosphere . . . had been utterly corrupted by press coverage." Cf. Murphy v. Florida, 421 U.S. 794, 798 (1975). In Rideau v. Louisiana, 373 U.S. 723 (1963), Estes v. Texas, 318 U.S. 532 (1965), and Sheppard v. Maxwell, 384 U.S. 333 (1966), prejudice was presumed from the circumstances under which the trials were held. "In those cases the influence of the news media, either in the community at large or in the courtroom itself, pervaded the proceedings." Murphy, supra, at 421 U.S. 799. Here, there was no repeatedly-televised confession of the accused as in Rideau, and no "circus atmosphere" or "courthouse given over to accommodate the public appetite for carnival" as in Estes or Sheppard. The juror-exposure to media accounts of Gall's prior convictions or of his being charged with the murder of Lisa Jansen do not support a presumption that he could not or did not have a fair trial in Boone County. Cf. Murphy, supra, at 421 U.S. 799; Spirko v. Commonwealth, Ky., 480 S.W.2d 169, 171 (1972).

The constitutional standard of fairness required that Gall have "a panel of impartial, 'indifferent' jurors." Irvin v. Dowd, 366 U.S. 717, 722 (1961). In Irvin, which was the United States Supreme Court's first reversal of a state conviction owing to prejudicial pretrial publicity, eight of the 12 jurors eventually selected thought the defendant guilty when examined during voir dire. By contrast, none of the 14 jurors chosen to hear Gall's case thought he was guilty when preliminarily questioned. Gall thus fails to show "the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality." Cf. Irvin, supra, 366 U.S. at p. 723.

In support of his contention that by reason of the pretrial publicity a pattern of deep and bitter prejudice against him prevailed throughout the community in which he was tried and convicted, Gall asserts that out of 51 veniremen examined 17 were excluded for expressing the opinion that he was guilty.[1] The point is not persuasive. In Murphy v. Florida, 421 U.S. 794 (1975), holding that the petitioner had not been deprived of due process, the court commented as follows:.

> "In the present case, by contrast, 20 of the 78 persons questioned were excused because they indicated an opinion as to petitioner's guilt. [fn] This may indeed be 20 more than would occur in the trial of a totally obscure person, but it by no means suggests a community with sentiment so poisoned against petitioner as to impeach the indifference of jurors who displayed no animus of their own." Murphy, supra, at 421 U.S. 803.

Finally, in terms of this particular proceeding, the very fact that in a capital case the court was able to complete a 14-member jury (including two alternates) from only 51 veniremen utterly refutes the existence of such community prejudice as would prevent the selection of a proper jury.

At a pretrial hearing on September 13, 1978, shortly prior to the date set for the trial (September 19), the court again heard Dr. Noelker, who testified that there had been no change with regard to Gall's mental capacity and that he was still competent to participate in the proceeding.

JURY SELECTION

The case was called for trial on September 19, 1978, beginning with the voir dire of prospective jurors, which continued through September 26, 1978.

---

[1] For the sake of accuracy, it does not necessarily follow that these veniremen, because they had preconceived opinions, were of the opinion that Gall was guilty. Our court, incidentally, indicates that 52 veniremen were called, but one was excused on hardship grounds without being further questioned.

The selection of 14 jurors (including two who were ultimately withdrawn upon final submission of the case to the jury) was completed after 51 veniremen had been examined on voir dire. All but two of the 51 expressed some degree of familiarity with the case. Seventeen had formed opinions with respect to Gall's guilt or innocence and were excused for that reason. Two were excused because they would be unable to render a verdict of capital punishment, and one because he could not say whether he would or would not be able to impose the death penalty. One who had been examined and one whose name had not been reached for voir dire were excused because they had violated the court's admonition not to discuss the case. Six were stricken on peremptory challenge by the Commonwealth and ten by the defense.

RCr 9.40 gives the Commonwealth six and the defense nine peremptory challenges in a felony case in which an alternate juror or jurors are impaneled. In this instance the trial court allowed each side one more. The Commonwealth used six of its seven strikes and the defense exercised its entire 10.

It would not be possible for a fair-minded person to read the record of this voir dire without being impressed by the earnest effort of the trial judge to accomplish the selection of an unbiased jury. It is, in our opinion, quite beyond question that Gall did in fact have as impartial a jury as could have been found anywhere. Nevertheless, we cannot overlook the possibility that a technical error was committed in the exclusion of the prospective juror Correll for the reason that he could not say whether he would or would not be able to consider a verdict recommending the death penalty. Cf. Witherspoon v. Illinois, 391 U.S. 510 (1968); Davis v. Georgia, 429 U.S. 122 (1976); Adams v. Texas, _____U.S._____(1980).

After a series of questions put to Mr. Correll by the prosecuting attorney had failed to elicit a definite answer as to whether his conscience would permit him to "consider the death penalty as is required by law," the trial court asked him, and he answered, as follows:

> Q "Would your feelings absolutely preclude you from imposing a sentence of death under any circumstances, any circumstances that you could think of?"
>
> A "I just don't know, sir, whether it would or would not, really."

The depth of Mr. Correll's irresolution was emphasized by his reply to a later question by defense counsel, as follows:

> Q "Mr. Correll, the court, in essence, is asking you if there is any case where you would consider imposing the death penalty. For instance, if Hitler were on trial here today for killing all the Jews, you could consider imposing the death penalty in that case couldn't you?"
>
> A "I would be undecided, sir. At this point."

It occurs to us that if a prospective juror will not say whether he can or cannot consider without prejudice the options from which he must choose in arriving at a verdict, he should be disqualified. The very least assurance to which the public is entitled is that he will exercise an honest discretion in resolving each issue submitted to him. Yet the effect of such equivocation is that on this important issue the juror will not give an assurance that he is able to exercise any discretion because he is not sure that his mind is open at the beginning. Surely it is elementary that a juror must be able to enter upon his duties with an open mind. It would seem beyond cavil that any court in the country would dismiss a prospective juror who could not say whether he would or would not be able to consider a verdict

resulting in a prison sentence. The reason is that such a juror could not be an impartial juror, and it occurs to us that fundamental justice guarantees to the public impartial jurors in capital cases as well as in less serious proceedings.

In Adams, supra, a statute required prospective jurors in a capital case to state under oath "that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact." The trial judge excused a number of prospective jurors who were unable or unwilling to take the oath. Some were excused because they admitted they would be "affected" by the possibility of the death penalty and others "because they were unable positively to state whether or not their deliberations would in any way be 'affected.'" This was held to be a violation of Witherspoon.

Under the Texas statutes applicable in Adams the jury first determined guilt or innocence and then, after a finding of guilt in a capital degree and a further hearing on aggravating and mitigating circumstances, answered three questions. If all three were answered in the affirmative, the trial judge was required to impose a sentence of death, otherwise a sentence of life imprisonment. Our statutes also provide for a bifurcated trial in which the jury first determines guilt and, after a finding of guilt, hears evidence bearing upon aggravating and mitigating factors. If it finds the existence of one or more aggravating circumstances as specified in KRS 532.025(2)(a), it is authorized to recommend the death penalty, but the trial court is not bound to impose it.

The trial court cannot sentence a defendant to death unless the jury, by a unanimous verdict, has found beyond a reasonable doubt the existence

of one or more of the aggravating circumstances listed in KRS 532.025(2)(a). KRS 532.035(3). There being no requirement that the trial judge abide by the jury's recommendation, once the jury has found an aggravating circumstance the trial judge has the discretion either to sentence the defendant to death, or to life imprisonment, or to a term of not less than 20 years in prison. KRS 532.030, 532.035.

So it may be seen that the jury's function with regard to the ultimate sentence is more limited here than it was under the Texas statute in Adams. Nevertheless, its determination that an aggravating circumstance existed is a sine qua non, and its recommendation of the death sentence, though not binding on the trial judge, obviously carries great weight. Hence we do not see any significant difference between our statutes and those of Texas insofar as the applicability of Adams may be concerned. There is, however, a dispositive distinction, we feel, between a prospective juror who admits he may be affected by the death penalty, or does not know whether he would or would not, and one who is unable to say even that he can consider that option. It is our opinion, therefore, that Adams does not apply to this case, and that Witherspoon does not require the acceptance of a juror who is unable to say that he can exercise an open-minded discretion with regard to the vital issues he will be called upon to decide. Cf. State v. Ross, La., 343 So. 2d 722, 726-7 (1977).

It will be recalled that the Commonwealth left one of its peremptory challenges unexercised. Surely, had the trial court denied its motion to strike Correll for cause, it would have used that challenge. Under

similar circumstances the Supreme Court of Georgia held possible Witherspoon errors to have been harmless. Alderman v. State, Ga., 246 S.E. 2d 642 (1978). See also State v. George, La., 346 So. 2d 694 (1977). We reach the same conclusion in this case.

TRIAL PROCEEDING - GUILT PHASE

During the course of the voir dire Gall made it known to the trial court that he wished to participate in the conduct of his defense, but without giving up the assistance of his appointed counsel. The court acceded, and Gall thereafter questioned various witnesses, made motions, interjected objections, and entered into discussions between court and counsel at the bench. At the time Gall initiated this development Dr. Noelker, who evidently maintained a fairly continuous observation of his conduct throughout the course of the trial, advised the trial court that Gall was getting pretty close to being incompetent, in that his desire to act the part of an attorney might very well be the result of underlying delusional patterns typical of paranoia. He believed, however, that Gall had not yet reached the point of incompetency to participate rationally in his defense, and there was no further question on that issue until the second day of the trial, at which time defense counsel moved for a continuance on the ground that Gall had become incompetent to stand trial. Dr. Noelker, called in support, testified in chambers that Gall had now transcended the bounds of reality, that although he continued to be competent in all other respects, "in my opinion he has disassociated himself from this trial and he is participating in it much more as the attorney than the defendant."

A major factor conducing to Dr. Noelker's conclusion in this respect was that Gall did not have much faith in the defense of insanity, preferring rather to cast his main defense along the lines of reasonable doubt.[2] He had some theories, apparently, that to Dr. Noelker and his counsel were bizarre. At this time both court and counsel interrogated Gall very closely in chambers, and the court arranged to have him examined that evening by a psychiatrist, Dr. Kenneth Lanter, following which Dr. Lanter appeared in chambers and testified that in his opinion Gall was mentally competent to participate in his defense and quite capable of making intelligent decisions in so doing.[3] Being convinced, both on the basis of his own observation and the opinion of Dr. Lanter, that Gall was not incompetent to participate in his defense, the trial judge denied counsel's motion for a continuance.

Thus far we do not perceive any failure by the trial court to protect the defendant from a possible inability, by reason of mental incompetence, to stand trial. RCr 8.06 provides that if at any time in the course of criminal proceedings there appear reasonable grounds to believe the defendant is insane, "the proceedings shall be postponed and the issue of insanity determined as provided by law." In their brief on this appeal, counsel for Gall contend that an incident which occurred during Gall's cross-examination of Detective Charles Seay constituted reasonable grounds to believe that Gall

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[2] Gall's theory was that the defense of insanity assumes commission of the criminal act, which he did not want to admit. He may not have been so dumb, much less insane.

[3] Illustrating his aptitude in this respect, during this inquiry into his competence Gall moved the court that he and the jurors be conducted to the scene of the crime in order that he might become acquainted with it. The motion was granted, thus enabling Gall to exploit his knowledge of details he would have had no reason to know unless he had visited the scene.

had indeed lost his senses and that the trial court of its own volition should have stopped the trial and conducted another sanity hearing.

Seay was the police officer who found the little girl's body on the morning of April 6, 1978. It so happened that he lived in the neighborhood and was familiar with the scene of the crime. When he testified, the details of the Gardnersville episode and the recovery of Gall's .357-caliber revolver had been described by other witnesses. It had also been revealed by the prosecuting attorney in his opening statement to the jury that Lisa Jansen had been shot twice, once through the head and once in the back, and that expert examiners had determined from the steel jacket of the bullet fired into her back that the shot had been fired from the weapon found in the automobile Gall was driving at the time of his arrest. On cross-examination Gall elicited from Officer Seay that he also carried a .357-caliber magnum revolver which was capable of firing the same type of ammunition as had been found in Gall's automobile. Then, Seay having also admitted that when he discovered Lisa's body his suspicions had already centered on Gall, Gall ended the cross-examination in this melodramatic fashion:

> "Okay, now you have testified today that the difference between a .38-caliber bullet and a .357 bullet, as far as the .357 would be, would have more penetrating power. Detective Seay, it took you ten minutes from 8:32 to 8:42 to locate the body of Lisa Jansen down a deserted road, heavily used by - as a lover's lane. I charge you with shooting that second shot through Smith & Wesson Revolver .357 using a .38-caliber bullet to put that second one in to use as evidence. No further questions, Your Honor."

Considering what the public has become accustomed to seeing on television nowadays, we do not think this ploy by Gall, in an attempt to lay a seed of doubt in the mind of some one or more of the jurors, was so out-

landish[4] as to raise a question of his mental competence. Even if Gall's attorneys had so moved, which they did not, this episode did not require the trial court to conduct another hearing on the issue of his sanity.

We turn now to the remaining questions relating to the admissibility of evidence, having previously disposed of the matter of the blood-sample.

Gall contends very strongly that the evidence of the Gardnersville incident should not have been admitted because it involved another crime and was not necessary in proving the rape and murder of Lisa Jansen. The Commonwealth sought to uphold the admissibility of this evidence on the ground that it supported an inference that Gall needed money to fund an escape. It is unnecessary to resort to such a chimerical theory. It is a settled principle that competent, relevant testimony will not be excluded on the mere ground that it reveals, to the defendant's obvious prejudice, an unrelated crime or crimes. The subject was thoroughly discussed in Jones v. Commonwealth, Ky., 554 S.W. 2d 363, 366-368 (1977), which is dispositive of the issue in this case. The Gardnersville escapade provided several important items of evidence connecting Gall with the Jansen murder. It put him in the same neighborhood in the same morning. It turned up, in Gall's possession, the murder weapon. The bullet removed from the wounded police officer and the steel jacket removed from Lisa's body were fired from the same gun, which would have served to identify the man who shot Trooper Carey as being also the murderer of Lisa even if the weapon itself had not been

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[4] It was not established until later in the trial, when the pathologist who had autopsied the body testified, that the two gunshot wounds had been inflicted "within essentially the same time frame." Neither, however, before that time had there been *any* revelation that the shot in the back had been the "second shot," as Gall so accurately identified it.

recovered. Moreover, Gall's apparent sangfroid during the robbery was relevant to the issue of possible emotional disturbance on his part. The argument that this series of events should not have been admitted in evidence is absurd. So is the point that its salient essentials were not in "actual dispute." Whether Gall was the murderer certainly was in actual dispute, and the Commonwealth was entitled to introduce whatever evidence was available to sustain its burden of proving the identity of the guilty party. There was no error in the admission of the entire Gardnersville episode.

The only other contentions worthy of mention with respect to the propriety of evidence admitted by the trial court relate to photographs and to the testimony of Joan Woods. Neither, in our opinion, raises a serious question.

The objectionable photographs consisted of color slides introduced in connection with the testimony of the clinical pathologist who had conducted the post-mortem examination of Lisa's body. We have examined them and do not find them so gruesome or prejudicial as to outweigh their probative value as a part of the doctor's description of what he had found. In recent years this court has followed a rather liberal policy with respect to the admissibility of photographs that are otherwise relevant. See Moore v. Commonwealth, Ky., 489 S.W. 2d 516, 518 (1973); Napier v. Commonwealth, Ky., 426 S.W. 2d 121 (1968); Salisbury v. Commonwealth, Ky., 417 S.W. 2d 244 (1967). It is no answer to say that defense counsel offered to stipulate the essential facts proved by the pathologist and illustrated by the photographs, hence they were unnecessary. The Commonwealth has a right to prove its case to the jury even when the defendant pleads guilty. The defendant

is not entitled to erase the ugly parts of the picture and substitute words in their place. If it were otherwise, by the simple stratagem of stipulating that deceased person was a female Gall could have concealed from the jury's knowledge the fact that the victim was a little girl. In order for a jury to be able to size up a case fairly and wisely it must be allowed to gain a reasonable perspective, and that can best be done by permitting it to see an unadulterated picture. We are of the opinion that the photographs here in question were admissible.

Joan Woods, age 12, was the friend who was waiting to go to school with Lisa Jansen when Lisa disappeared, and was called as one of the first witnesses establishing the the chronology of events. Apparently she was emotionally upset and had been crying when she took the witness stand. Defense counsel objected to her appearance as a witness on the ground that she was simply being used to "upset the jury," and he offered to stipulate "that she didn't see Lisa that morning." When she described her relationship to Lisa as her "best friend" she began to cry again, whereupon the prosecuting attorney held her hand in order to help restore her self-control. She was able to complete her brief appearance as a witness without further incident.

We agree that Joan's testimony was not vital. It was relevant, because it proved the time of Lisa's disappearance, but it was merely cumulative of testimony already given by Lisa's mother. The prosecuting attorney might better have chosen discretion above valor, but we do not view it as an abuse of discretion on the part of the trial court to let the little girl testify. Nor do we apprehend that the grown men and women who comprised the jury could have been so light-headed as to be seriously affected in their ultimate deliberations by this little vignette of girlish hysteria.

Gall makes several contentions with regard to the court's instructions to the jury. First he says that the court should have given a peremptory instruction of acquittal on the ground that as a matter of law the evidence established his insanity at the time of the offense. What this argument overlooks, however, is that there was substantial and competent expert testimony to the contrary. Even if Dr. Noelker's testimony were accepted at face value, he conceded that there were periods of remission in which Gall could function in a legally sane manner. Gall himself did not take the stand, and there was no eyewitness testimony showing the circumstances immediately attending the rape and murder. On the particular issue of insanity Gall had the burden of proof, and we certainly cannot hold that the controverted post-factum opinions of his experts were so compelling that reasonable minds could not fairly differ.

Gall presents two arguments on the subject of extreme emotional disturbance. The first is that the Commonwealth did not produce any evidence that he did not act under the influence of extreme emotional disturbance, hence the evidence was not sufficient to support the trial court's instruction on murder. The second is that the "extreme emotional disturbance" phase of the murder instruction was fatally deficient in omitting the words, "the reasonableness of which is to be determined from the standpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be." Cf. KRS 507.020(1)(a).

Under the law of this state prior to adoption of the Kentucky Penal Code, effective January 1, 1975, a homicide that would otherwise have con-

stituted wilful murder was classified as the lesser degree of voluntary manslaughter if it occurred in a sudden affray or in sudden heat of passion and upon such provocation "as would have naturally overcome and suspended the self-control of a man of fair, ordinary and average disposition or will power or cause such a one to act rashly or without due deliberation or reflection." Tarrence v. Commonwealth, Ky., 265 S.W. 2d 40, 51 (1954).

Voluntary manslaughter has been replaced in the Penal Code by manslaughter in the first degree, which is defined in KRS 507.030. In lieu of sudden affray or sudden heat of passion upon reasonable provocation, the mitigating circumstance now reducing the crime from murder to manslaughter is that the defendant "acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be." KRS 507.030(1)(b).

According to the Commentary prepared by the drafter of this portion of the Penal Code, "The most significant change brought about by subsection (1)(b) is an abandonment of the common law requirement that the killing occur in 'sudden heat of passion' upon 'adequate provocation.' Adopted in its place is the requirement that the homicide be committed 'under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse.' Under this standard, which was borrowed from the Model Penal Code, mitigation is not restricted to circumstances which would constitute provocation 'in the ordinary meaning of the term, i.e., an injury, injustice

or affront perpetrated by the deceased upon the actor.' . . . In other words, it is possible for any event, or even words, to arouse extreme mental or emotional disturbance, as that phrase is used here." (Emphasis added.)

"A second significant change . . . is the addition of a subjective element to the test used for determining the mitigation issue. The test set forth is an objective one: Is there a 'reasonable explanation or excuse' for the mental or emotional disturbance? But, in making that determination, the triers of fact are required to place themselves in the actor's position as he believed it to be at the time of his act. This is intended to replace the common law requirement that the provocation must be of a nature calculated to inflame the passions of the ordinary reasonable man." KRS 507.030, Commentary (1974).

Although the substantive factors reducing murder to manslaughter are thus made different by the new statute, the procedural aspects remain unchanged. The Commonwealth still has the burden of proof, but in order to justify an instruction on the lower degree there must be something in the evidence sufficient to raise a reasonable doubt whether the defendant is guilty of murder or manslaughter. "Evidence suggesting that a defendant was guilty of a lesser offense is, in fact and in principle, a defense against the higher charge, though it is not a 'defense' within the technical meaning of the Kentucky Penal Code, cf. KRS 500.070." Brown v. Commonwealth, Ky., 555 S.W. 2d 252, 257 (1977).

An instruction on voluntary manslaughter is proper "only in those

instances where there is evidence that will support the giving of the instruction." Elmore v. Commonwealth, Ky., 520 S.W. 2d 328, 331 (1975). "We have adopted the rule that where the evidence is wholly circumstantial and the facts lead inescapably to the conclusion that the crime, whoever committed it, was murder, there being no evidence of a struggle or other unusual circumstances from which the jury might infer a lesser degree of the crime, the accused is not entitled either to a manslaughter or self-defense instruction." Brown v. Commonwealth, Ky., 275 S.W. 2d 928, 933 (1955). That was the law prior to the Penal Code, and it continues to be the law under the Penal Code. An instruction on murder need not require the jury to find that the defendant was not acting under the influence of extreme emotional disturbance unless there is something in the evidence to suggest that he was, thereby affording room for a reasonable doubt in that respect. Cf. Brown v. Commonwealth, Ky., 555 S.W. 2d 252, 257 (1977).

In this case there was no eyewitness evidence of the killing, and the defendant himself did not testify. Assuming that he was the guilty party, as the jury found him to be, there is not a shred of evidence to suggest that he was acting under the influence of an emotional disturbance, or that there were any circumstances existing at the time of the killing to provoke or stimulate such a disturbance, except for the evidence that he suffered from a mental illness from which the jury could have found, but did not find, that he was insane. The nature of that illness was chronic paranoid schizophrenia, which was characterized not only as "an extreme emotional disturbance," but "the most severe personality disorder that we are able to diagnose."

There is much to be said for the proposition that an emotional disturbance inhering in a mental illness is not the kind of an emotional disturbance contemplated by the statute, in view of its historical development and the expression in the Commentary to the effect that it may be aroused by "any event, or even words," as quoted above. Assuming, however, that a mental disorder, whether or not it amounts to legal insanity, may constitute a reasonable "explanation or excuse" for extreme emotional disturbance, it was incumbent upon the trial court to require the negating of that factor in its instruction on murder, which was done. That is not to say that once the issue is raised (by evidence sufficient to ground a reasonable doubt) the Commonwealth must meet it with countervailing evidence. Unless the evidence raising the issue is of such probative force that otherwise the defendant would be entitled to a directed verdict of acquittal, the prosecution is not required to come forth with negating evidence in order to sustain its burden of proof. Cf. Brown v. Commonwealth, Ky., 555 S.W. 2d 252, 257, fn. 6 (1977). Otherwise it would never be possible to convict a defendant of murder if there were no eyewitnesses and if, for example, he testifies that he acted in self-defense, or was intoxicated out of his mind, or was acting under the influence of extreme emotional disturbance.[5]

While it is true that the "extreme emotional disturbance" phase of the murder instruction did not include the additional statutory language, "the reasonableness of which is to be determined from the standpoint of a

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[5]On all of these issues, when raised by the evidence, the Commonwealth has the burden of proof beyond a reasonable doubt.

person in the defendant's circumstances as the defendant believed them to be," we are of the opinion that the omission was proper. Obviously that particular language is appropriate only when there is evidence suggesting that the emotional disturbance was precipitated by some event or circumstance the defendant believed to exist. In this case there was no evidence to suggest that the appellant's motivation involved any "belief" on his part with regard to the circumstances that induced the alleged emotional disturbance. Ratliff v. Commonwealth, Ky., 567 S.W. 2d 307 (1978), is factually distinguishable in this particular respect.

Although the form of the instruction given by the trial court on first-degree manslaughter (based on extreme emotional disturbance) does not conform to this court's conception of proper instructions in that respect (see, e.g., Palmore and Lawson, Kentucky Instructions to Juries, Sec. 2.01, Instructions 2 and 5,and Sec. 2.02, Instructions 2 and 3), it was given exactly as offered by defense counsel, and it did provide a vehicle by which the jury could have found Gall guilty of a lesser offense than murder if it had been so disposed. So, even though we are not entirely convinced that Gall was entitled to any instruction whatever based on the mitigating theory of emotional disturbance, we are of the opinion that under the circumstances of the case there was no substantial error in the manner in which it was submitted to the jury.

Instruction No. 3 presented the defense of insanity, and was in correct form except for its use of the words, "by a preponderance of the evidence" in lieu of "from the evidence." Again, this portion of the instruction was given exactly as requested by Gall. Now, as a result, we find his

appellate counsel crying out that "preponderance of the evidence" should have been defined. This court disapproves the use of that terminology. "From the evidence" is sufficient in all civil cases, and with the qualifying phrase "beyond a reasonable doubt" it is sufficient in a criminal case. We would not for that reason, however, reverse this judgment. There is no reason to suppose or suspect that the jurors were ignorant bumpkins.

Instruction No. 4 paraphrased that portion of RCr 9.56 referring to reasonable doubt as to degree, but did not specify which of the two offenses covered by the preceding instructions was the higher degree.[6] No doubt any juror with common sense would be able to figure that out for himself, but here again we encounter a claim of prejudice that could easily have been avoided. A careful instruction on the matter of degree should clarify the relationship between the murder and first-degree manslaughter instructions by stating in substance that if the jury believes beyond a reasonable doubt that the defendant would be guilty under the murder instruction except for its having a reasonable doubt as to whether he was acting under the influence of extreme emotional disturbance, it shall not find him guilty of murder, but shall find him guilty of first-degree manslaughter. See e.g., Palmore and Lawson, Kentucky Instructions to Juries, Sec. 2.01, Instruction 5,and Sec. 2.02, Instruction 3. Though a better instruction on doubt as to degree could have been given, Instruction No. 4 did meet the requirements of RCr 9.56 in that particular respect and was not prejudicially erroneous.

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[6]Neither did the instruction offered by counsel for Gall.

Gall's appellate counsel complain also that the trial court did not define the term "reasonable doubt" and did not instruct the jury in so many words that the Commonwealth bore the burden of proof. There was no error in either respect. The subject was discussed in Whorton v. Commonwealth, Ky., 570 S.W. 2d 627, 631-632 (1978), and there have been no authoritative decisions since that time to suggest either that "reasonable doubt" must be defined or that specific reference should be made to the burden of proof.

Several points are made with regard to the alleged misconduct of the prosecuting attorney. It is said, for example, that he invaded Gall's right to a fair trial by belittling his defense of insanity and by misportraying various items of evidence in his concluding remarks to the jury. To be mercifully brief, we do not find in this record any conduct by the prosecuting attorney that could be said to have been inconsistent with Gall's right to a fair trial.

Another argument is that by informing the prospective jurors during voir dire that the Commonwealth would not introduce any confession the prosecuting attorney was in effect commenting wrongfully on Gall's silence. We do not draw such an inference. There is nothing particularly wrong in advising the jurors that the prosecution will rely on circumstantial evidence.

When he was arrested at the end of the Gardnersville incident Gall made several statements with respect to the weapon he had in his possession, the number of shots he had fired at Trooper Carey, and the reason he had fired them. During direct examination of the officer to whom these statements had been made the prosecuting attorney asked if he had tried to talk to Gall

at greater length "about other matters," to which the witness replied, "Yes, but he wouldn't talk." "In other words, that is all he would say?" "That is all he said." We do not construe this exchange as an attempt to comment on Galls's silence, nor do we think that it was likely to draw the jury's attention to Gall's silence.[7]

During voir dire one of the prospective jurors (a Mrs. Koenig, upon whom the defense later exercised one of its peremptory challenges), under interrogation by defense counsel, said that she could acquit Gall on the ground of insanity "if he was taken care of ... if he were taken out of society." Counsel thereupon attempted to inform Mrs. Koenig that in the event of an acquittal on the basis of insanity certain civil commitment procedures are available, but upon objection by the prosecuting attorney the court would not permit him to continue. No further effort was made during the proceedings to enlighten the jury in this respect. Citing the fact that this court has held it permissible for the prosecutor to point out in his closing argument that in the event of an acquittal on grounds of insanity there is no assurance that the defendant will not soon be at large again, Jewell v. Commonwealth, Ky., 549 S.W. 2d 807, 812 (1977), but has held also that the defendant is not entitled to an instruction advising the jury that in the event of his being found not guilty by reason of insanity he can be committed, Edwards v. Commonwealth, Ky., 554 S.W. 2d 380, 383-384 (1977), Gall argues that we have created a legal monstrosity which deprives the

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[7]It was later developed through the testimony of Dr. Noelker and the psychiatrists that Gall claimed to have no recollection of being in northern Kentucky on the morning in question.

defendant of due process. It should be understood, however, that Edwards does not prohibit defense counsel from reminding the jury that if the defendant is acquitted on the grounds of insanity at the time of the offense, and if he lapses into that condition again, there are legal means to bring about his commitment, because that is the simple truth. But it cannot be truthfully said that he will be committed, because if he is sane enough to be participating in the trial there is very little likelihood of his being validly found insane immediately thereafter. The most that defense counsel can say, and we have never held that he cannot say it, is that if after the defendant is acquitted there appear reasonable grounds to believe he is insane and ought to be committed to an institution, he can be tried in a civil commitment proceeding. We adhere, however, to the view that the prospects of what may or can happen after the verdict do not belong in the instructions given by the court to the jury. There is no sensible due process question in this respect.

TRIAL PROCEEDINGS - PENALTY PHASE

In the second phase of the trial, after the jury had found Gall guilty of murder, the Commonwealth introduced no further evidence except for a synopsis of his previous felony convictions, which was admitted by stipulation. The prosecuting attorney informed the jury in a brief opening statement that the only statutory aggravating circumstance on which it would

rely[8] was that the murder had been committed in the course of rape and that the evidence in that respect had been sufficiently developed in the guilt phase of the trial.

The defense introduced Gall's mother, father, and divorced wife, all of whom testified in considerable detail about his personal history. Dr. Noelker appeared again and testified that probably Gall could function reasonably well in a structured prison environment. In addition, affidavits of two other persons who had been subpoenaed but could not appear[9] were read into evidence. One was that of a university professor in the field of sociology and correctional psychology who had specialized in criminology and capital punishment. He said, in substance, citing text materials in support, that capital punishment is not a deterrent to crime and that other methods of dealing with convicted criminals have proved to be of greater value to society. The other absent witness was a retired investigative news

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[8]One of the aggravating circumstances enumerated in KRS 532.035(2)(a) was that "the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions." This was not submitted to the jury, however, because the trial court was persuaded that it was unconstitutionally vague, as the Georgia court had decided in Arnold v. State, 236 Ga. 534, 224 S.E.2d 386, 391-392 (1976). The stipulated synopsis of prior felony convictions was relevant only because one of the mitigating circumstances listed by KRS 532.025(2)(b) was, "The defendant has no significant history of prior criminal activity." Only by proving the criminal history of a defendant could the Commonwealth preclude defendant's reliance upon this particular mitigating circumstance.

[9]The third absent witness was an Ohio attorney who had represented Gall in 1970. Counsel did not offer in evidence the affidavit showing what his testimony would have been. At the beginning of the sentencing phase of the trial Gall moved for a continuance by reason of the absence of these witnesses, and on this appeal he contends that the denial of a continuance was a prejudicial error. We do not think so.

reporter and writer who had personally witnessed 22 executions by electrocutions between 1933 and 1957. His affidavit consisted of graphic descriptions illustrating the gruesome nature of the process.

In its instructions the trial court confined the consideration of aggravating circumstances to whether the murder was committed in the course of rape, but allowed the jury to consider four specific mitigating circumstances for which there was some semblance of evidentiary basis and a fifth or catch-all category "whether or not there are other mitigating circumstances presented through the evidence, not listed above." The instructions made it clear that the jury could not recommend the death penalty unless by unanimous verdict it found beyond a reasonable doubt that the aggravating circumstance existed, but that even in that event, and even though it might believe the aggravating circumstance outweighed such mitigating circumstances it might find to exist, it still did not have to recommend the death penalty.

The jury retired to deliberate at 4:47 p.m. At 5:05 p.m. it submitted a question to the court on the subject of parole or pardon and was advised that the court could not enlighten it beyond what was contained in the written instructions. At 7:23 p.m. the jury returned a verdict finding that Gall had committed the offense of murder while engaged in the commission of rape [10] and that none of the mitigating circumstances set forth in the instructions existed, and recommending the death penalty. Four days later the trial court entered judgment accordingly, from which this appeal followed.

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[10] We construe the statutory language of KRS 532.025(2)(a) pertaining to rape as meaning that the murder was committed incident to a rape, as distinguished from its having been committed during the physical act of sexual intercourse.

Whereas the jury found no mitigating circumstances, Gall contends that two such circumstances existed as a matter of law and that the jury should have been so directed. These two circumstances, both statutory, are (1) the offense was committed under extreme mental or emotional disturbance even though not sufficiently so to constitute a defense, and (2) at the time of the offense the defendant's mental capacity was impaired by disease or defect even though not sufficiently to constitute a defense. Again, as we have observed earlier in this opinion, there was a sharp conflict in the evidence as to whether Gall was insane at all, and there was no evidence whatever to suggest extreme emotional disturbance unless he was in fact insane. Whatever may be our personal viewpoints with regard to his mental condition, we are not permitted to substitute them for what the jury found under substantial conflicting evidence. If the jury was not compelled, as the trier of facts, to find Gall insane, certainly it was not compelled to find any emotional disturbance, nor can we say it was bound to find a quasi or diminished degree of either.

It is further argued that in view of both the expert testimony and Gall's history of mental illness,and with such other resources as may have been available after the verdict, the trial court should have exercised its discretion to inflict a lesser sentence than death. Though counsel alludes to the analogy of Pontius Pilate, it must be remembered that Gall was not tried by a rabble. We cannot say that the trial court abused its discretion in this respect.

Perhaps the real problem lies in the very nature of the defense of insanity. It may be too much to ask of any set of men or women to make a dispassionate assessment of a criminal defendant's mental condition,

especially in the setting of a revolting offense he has committed. Some of our sister states have endeavored to meet the problem by authorizing a verdict of "guilty but mentally ill" (short of legal "insanity") under which the sentence is not affected but the defendant while serving it may be confined as long as may be necessary in a mental institution. We commend that approach to our own General Assembly.[11] Under the law as we now have it, however, it is the responsibility and province of the trial jury to make a black-or-white determination of insanity, and it is the prerogative of the legislative representatives of the people to have it so.

Gall contends that for several different reasons our statutes authorizing the death penalty are unconstitutional, under both the federal and state constitutions. The existence of "capital" offenses is recognized in the 5th Amendment of the United States Constitution and in Sec. 16 of the Constitution of Kentucky. While there are a good many judicial pragmatists in this country who evidently feel no compunction in amending the federal constitution to suit their own notions of justice, we continue to believe that such authority belongs only to the people. The fight over capital punishment belongs in the political arena, where the will of the public can best be ascertained and expressed. It should not be resolved by judicial policy or by the exercise of raw judicial power. In our opinion it is not a constitutional issue and we do not find it unconstitutional.

One last contention is that the trial court failed to comply with the presentencing procedure required by KRS 532.050, an argument that is refuted

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[11] Cf. Mich. Comp. Laws Ann., Sec. 768.36; Indiana Code 35-5-2, 6, eff. 9-1-80.

on the face of the statute, which applies only to conviction for a felony "other than a capital offense."

REVIEW OF SENTENCE

KRS 532.075 requires this court to review any death sentence and to consider the punishment as well as any errors raised on appeal. For its assistance in this regard KRS 532.075 (6) directs it to compile the records of "all felony offenses in which the death penalty was imposed after January 1, 1970, or such earlier date as the court may deem appropriate." The list of the cases considered pursuant to that directive is attached as an appendix to this opinion.[12]

The Public Advocate of the state, whose office represents Gall on this appeal, has kept up an incessant drumbeat contending that he is constitutionally entitled, incident to the appeal of each death sentence, to have access to the materials compiled for this court pursuant to KRS 532.075 (6). We took great pains to answer that contention in Ex parte Farley, Ky., 570 SW 2d 617 (1978). See also Ross v. State, Ga., 211 SE 2d 356, 359-360 (1974).

There have been no legal executions in Kentucky since 1962, and in every instance in which a death penalty has come before this court since January 1, 1970, either the conviction has been set aside on grounds of error or the sentence has been reduced to life imprisonment because the statute was found to be invalid, usually under Furman v. Georgia, 408 U.S. 238 (1972). Gall is the 17th person who has appealed a death sentence to this court since the beginning of 1970. We have made a comparative study of his sentence with reference to the other 16. Considering both the nature of

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[12] Among the many points raised in Gall's voluminous brief is the suggestion that the statutory imposition of these procedures invades the judicial rule-making power. It may be so, but as a matter of comity we have no objection to complying with them.

the crime and the defendant, Gall's sentence is not excessive or disproportionate to the penalty imposed in similar cases. The evidence supports the jury's finding of an aggravating circumstance as defined by KRS 532.025 (2)(a) 2, and the sentence does not appear to have been imposed under the influence of passion, prejudice, or any other arbitrary factor.

The judgment is affirmed.

Palmore, C.J., and Aker, Clayton, Lukowsky, Stephenson and Sternberg, JJ., sitting. All concur. Stephens, J., having participated in the proceeding in his capacity as Attorney-General, did not take part in the consideration or disposition of the appeal.

APPENDIX

Name of Case	Date of offense
Scott v. Commonwealth, Ky., 495 SW 2d 800 (1973)	6-30-69
Leigh v. Commonwealth, Ky., 481 SW 2d 75 (1972)	10-25-69
Lenston and Scott v. Commonwealth, Ky., 497 SW 2d 561 (1973)	12-30-69
Call v. Commonwealth, Ky., 482 SW 2d 770 (1972)	3-2-70
Caldwell v. Commonwealth, Ky., 503 SW 2d 485(1972)	4-18-70
Tinsley and Tinsley v. Commonwealth, Ky., 495 SW 2d 776(1973)	5-2-70
Galbreath v. Commonwealth, Ky., 492 SW 2d 882 (1973)	5-8-71
Caine and McIntosh v. Commonwealth, Ky., 491 SW 2d 824(1973)	9-13-71
Hudson v. Commonwealth, Ky., 597 SW 2d 610(1980)	2-10-75
Meadows v. Commonwealth, Ky., 550 SW 2d 511(1977)	5-25-75
Self v. Commonwealth, Ky., 550 SW 2d 509 (1977)	7-30-75
Boyd v. Commonwealth, Ky., 550 SW 2d 507 (1980)	9-17-75
Smith v. Commonwealth, Ky., 599 SW 2d 900 (1980)	7-1-78

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Supreme Court of Kentucky

79-SC-29-MR

EUGENE WILLIAM GALL, JR. — APPELLANT

V.

APPEAL FROM BOONE CIRCUIT COURT
HONORABLE SAMUEL NEACE, JUDGE
NO. 78-CR-097

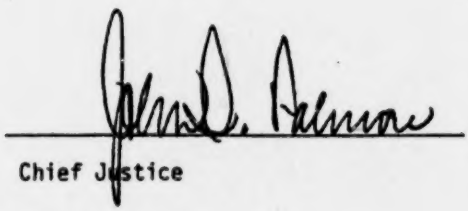
COMMONWEALTH OF KENTUCKY — APPELLEE

ORDER DENYING PETITION FOR REHEARING

Appellant's petition for rehearing is denied. The opinion is modified on its face.

All concur.

ENTERED October 14, 1980.



Chief Justice

In this instance the trial court had before it an indictment charging Gall with the murder of Lisa Jansen and affidavits by the Commonwealth's Attorney and a detective of the Kentucky State Police stating that the physical samples were needed "for purposes of completing their investigation into the rape and death of Lisa Jansen." It seems to us that the relevance and importance of such evidence in a case involving rape are self-evident. We therefore hold that the order granting permission to obtain it from Gall's person was reasonable and was a valid basis for the subsequent admission of testimony derived from its analysis. Cf. Thompkins v. State, Ind., 383 N.E. 2d 347, 351 (1979).

Also on the day of the arraignment the trial court, by agreement of the parties, appointed Dr. Robert Noelker, a psychologist, to examine Gall for the purpose of determining (a) whether he was mentally competent to stand trial and (b) whether at the time of the offense he had the mental capacity to appreciate the criminality of his conduct and to conform his conduct to the law. Contemporaneously the Commonwealth secured the services of Dr. Lee Chutkow, a psychiatrist, for the purpose of determining his competence to stand trial. A hearing on the first of these questions was held on May 26, 1978, following which the court found Gall to be competent and set the case for trial on the merits.

On September 6, 1978, defense counsel moved for a change of venue on the ground that by reason of local publicity Gall could not be given a fair trial in Boone County or in any of the surrounding northern-Kentucky counties. We have examined the affidavits, counteraffidavits and exhibits (numerous newspaper articles) filed in connection with this motion and are of the opinion that the trial court did not abuse its discretion in declining a change of venue.

In support of his contention that by reason of the pretrial publicity a pattern of deep and bitter prejudice against him prevailed throughout the community in which he was tried and convicted, Gall asserts that out of 51 veniremen examined 17 were excluded for expressing the opinion that he was guilty.[1] The point is not persuasive. In Murphy v. Florida, 421 U.S. 794 (1975), holding that the petitioner had not been deprived of due process, the court commented as follows:

> "In the present case, by contrast, 20 of the 78 persons questioned were excused because they indicated an opinion as to petitioner's guilt. [fn] This may indeed be 20 more than would occur in the trial of a totally obscure person, but it by no means suggests a community with sentiment so poisoned against petitioner as to impeach the indifference of jurors who displayed no animus of their own." Murphy, supra, at 421 U.S. 803.

Finally, in terms of this particular proceeding, the very fact that in a capital case the court was able to complete a 14-member jury (including two alternates) from only 51 veniremen utterly refutes the existence of such community prejudice as would prevent the selection of a proper jury.

At a pretrial hearing on September 13, 1978, shortly prior to the date set for the trial (September 19), the court again heard Dr. Noelker, who testified that there had been no change with regard to Gall's mental capacity and that he was still competent to participate in the proceeding.

JURY SELECTION

The case was called for trial on September 19, 1978, beginning with the voir dire of prospective jurors, which continued through September 26, 1978.

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[1] For the sake of accuracy, it does not necessarily follow that these veniremen, because they had preconceived opinions, were of the opinion that Gall was guilty. Our count, incidentally, indicates that 52 veniremen were called, but one was excused on hardship grounds without being further questioned.

resulting in a prison sentence. The reason is that such a juror could not be an impartial juror, and it seems to us that fundamental justice guarantees to the public impartial jurors in capital cases as well as in less serious proceedings.

In Adams, supra, a statute required prospective jurors in a capital case to state under oath "that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact." The trial judge excused a number of prospective jurors who were unable or unwilling to take the oath. Some were excused because they admitted they would be "affected" by the possibility of the death penalty and others "because they were unable positively to state whether or not their deliberations would in any way be 'affected.'" This was held to be a violation of Witherspoon.

Under the Texas statutes applicable in Adams the jury first determined guilt or innocence and then, after a finding of guilt in a capital degree and a further hearing on aggravating and mitigating circumstances, answered three questions. If all three were answered in the affirmative, the trial judge was required to impose a sentence of death, otherwise a sentence of life imprisonment. Our statutes also provide for a bifurcated trial in which the jury first determines guilt and, after a finding of guilt, hears evidence bearing upon aggravating and mitigating factors. If it finds the existence of one or more aggravating circumstances as specified in KRS 532.025(2)(a), it is authorized to recommend the death penalty, but the trial court is not bound to impose it.

The trial court cannot sentence a defendant to death unless the jury, by a unanimous verdict, has found beyond a reasonable doubt the existence

of one or more of the aggravating circumstances listed in KRS 532.025 (2)(a). KRS 532.025 (3). There being no requirement that the trial judge abide by the jury's recommendation, once the jury has found an aggravating circumstance the trial judge has the discretion either to sentence the defendant to death, or to life imprisonment, or to a term of not less than 20 years in prison. KRS 532.030, 532.035.

So it may be seen that the jury's function with regard to the ultimate sentence is more limited here than it was under the Texas statute in Adams. Nevertheless, its determination that an aggravating circumstance existed is a sine qua non, and its recommendation of the death sentence, though not binding on the trial judge, obviously carries great weight. With regard to the applicability of Adams, vel non, there is a dispositive distinction, we feel, between a prospective juror who admits he may be affected by the death penalty, or does not know whether he would or would not, and one who is unable to say even that he can consider that option. It is our opinion, therefore, that Adams does not apply to this case, and that Witherspoon does not require the acceptance of a juror who is unable to say that he can exercise an open-minded discretion with regard to the vital issues he will be called upon to decide. Cf. State v. Ross, La., 343 So. 2d 722, 726-7 (1977).

It will be recalled that the Commonwealth left one of its peremptory challenges unexercised. Surely, had the trial court denied its motion to strike Correll for cause, it would have used that challenge. Under

is not entitled to erase the ugly parts of the picture and substitute words in their place. In order for a jury to be able to size up a case fairly and wisely it must be allowed to gain a reasonable perspective, and that can best be done by permitting it to see an unadulterated picture. We are of the opinion that the photographs here in question were admissible.

Joan Woods, age 12, was the friend who was waiting to go to school with Lisa Jansen when Lisa disappeared, and was called as one of the first witnesses establishing the chronology of events. Apparently she was emotionally upset and had been crying when she took the witness stand. Defense counsel objected to her appearance as a witness on the ground that she was simply being used to "upset the jury," and he offered to stipulate "that she didn't see Lisa that morning." When she described her relationship to Lisa as her "best friend" she began to cry again, whereupon the prosecuting attorney held her hand in order to help restore her self-control. She was able to complete her brief appearance as a witness without further incident.

We agree that Joan's testimony was not vital. It was relevant, because it proved the time of Lisa's disappearance, but it was merely cumulative of testimony already given by Lisa's mother. The prosecuting attorney might better have chosen discretion above valor, but we do not view it as an abuse of discretion on the part of the trial court to let the little girl testify. Nor do we apprehend that the grown men and women who comprised the jury could have been so light-headed as to be seriously affected in their ultimate deliberations by this little vignette of girlish hysteria.

Gall makes several contentions with regard to the court's instructions to the jury. First he says that the court should have given a peremptory instruction of acquittal on the ground that as a matter of law the evidence established his insanity at the time of the offense. On that particular issue, however, Gall had the burden of proof, and we certainly cannot hold that the post-factum opinions of his experts were so compelling that reasonable minds

could not fail to be convinced by them. Moreover, considering the nature of chronic paranoid schizophrenia, the mental illness from which he was alleged to be suffering, and the testimony to the effect that it not only was of long standing but probably not curable, the observations made by Dr. Chutkow on the basis of his examination of Gall on April 30, 1978, cast considerable doubt that he was afflicted with that disease on April 5, 1978. We recognize, of course, that one may be "insane" and yet competent to stand trial, and that the direct purpose of this examination was to determine his competence to stand trial, but the fair import of Dr. Chutkow's testimony was that he found no evidence of paranoid schizophrenia existing at that time. Even if Dr. Noelker's testimony were accepted at face value, he conceded that there were periods of remission in which Gall could function in a legally sane manner. Gall himself did not take the stand, and there was no eyewitness testimony showing the circumstances immediately attending the rape and murder.

Gall presents two arguments on the subject of extreme emotional disturbance. The first is that the Commonwealth did not produce any evidence that he did not act under the influence of extreme emotional disturbance, hence the evidence was not sufficient to support the trial court's instruction on murder. The second is that the "extreme emotional disturbance" phase of the murder instruction was fatally deficient in omitting the words, "the reasonableness of which is to be determined from the standpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be." Cf. KRS 507.020 (1)(a).

Under the law of this state prior to adoption of the Kentucky Penal Code, effective January 1, 1975, a homicide that would otherwise have con-

COMMONWEALTH OF KENTUCKY

Supreme Court of Kentucky

MANDATE

EUGENE WILLIAM GALL, JR.

File No. 79-SC-29-MR
VS. Opinion Rendered September 2, 1980
COMMONWEALTH OF KENTUCKY

Appeal From Boone
Circuit Court Action No. 78-CR-097

The Court being sufficiently advised, it seems to them there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed, and same shall be carried into execution as provided by law on the fifth Friday following the date of the issuance of this mandate, which is ordered to be certified to the Superintendent (Warden) of the Kentucky State Penitentiary at Eddyville, Kentucky.

October 14, 1980 Appellant's petition for rehearing is denied. The opinion is modified on its face.

A Copy - Attest:

Issued October 14, 1980

JOHN C. SCOTT, CLERK

Form SCC-9

BY _____

as a matter of law to an acquittal on the higher charge (murder),

There is much to be said for the proposition that an emotional disturbance inhering in a mental illness is not the kind of an emotional disturbance contemplated by the statute, in view of its historical development and the expression in the Commentary to the effect that it may be aroused by "any event, or even words," as quoted above. Assuming, however, that a mental disorder, whether or not it amounts to legal insanity, may constitute a reasonable "explanation or excuse" for extreme emotional disturbance, it was incumbent upon the trial court to require the negating of that factor in its instruction on murder, which was done. That is not to say that once the issue is raised (by evidence sufficient to ground a reasonable doubt) the Commonwealth must meet it with countervailing evidence. Unless the evidence raising the issue is of such probative force that otherwise the defendant would be entitled [illegible] the prosecution is not required to come forth with negating evidence in order to sustain its burden of proof. Cf. Brown v. Commonwealth, Ky., 555 S.W. 2d 252, 257, fn. 6 (1977). Otherwise it would never be possible to convict a defendant of murder if there were no eyewitnesses and if, for example, he testifies that he acted in self-defense, or was intoxicated out of his mind, or was acting under the influence of extreme emotional disturbance.[5]

While it is true that the "extreme emotional disturbance" phase of the murder instruction did not include the additional statutory language, "the reasonableness of which is to be determined from the standpoint of a

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[5]On all of these issues, when raised by the evidence, the Commonwealth has the burden of proof beyond a reasonable doubt.

JUDGE NEACE: Okay.

(Discussion at bench concluded)

JUDGE NEACE: Okay, Mr. Correll, Mr. Sheriff

(Mr. Correll enters courtroom)

JUDGE NEACE: Mr. Correll, we are making a record of these proceedings, for the record will you state your name please?

MR. CORRELL: David Correll.

JUDGE NEACE: Is that C O R R E L L?

MR. CORRELL: Yes.

JUDGE NEACE: Your address?

MR. CORRELL: 105 South Girrard, Burlington.

JUDGE NEACE: And your age please sir.

MR. CORRELL: Forty Five.

JUDGE NEACE: Thank you. Mr. Mathis care to examine?

MR. MATHIS: Thank you, Your Honor.

VOIR DIRE OF DAVID CORRELL, Juror No. 28

BY MR. MATHIS:

Mr. Correll, my name is Bill Mathis and I am the Commonwealth Attorney and as Commonwealth Attorney it is my duty to prosecute this case that is before us today. Seated on my right, by way of introduction to you is my Assistant, Mr. Jay Bamberger in the middle and on my far right is Mr. Jim Caldwell who is the Commonwealth Detective in this Distric the other people seated behind me are members of our staff.

Mr. Correll, we are here to talk to you about your qualifications to sit as a juror on the cas of Commonwealth of Kentucky vs. Eugene Williams Gall. The Grand Jury of this County has charged that on April 5, 1978 Mr. Eugene Gall, the Defendant seated on the right over there did intentionally murder Lisa Jansen.

Let me first ask you sir, first let me put you at ease a little bit, there are no wrong answers to these questions. We are trying to get to know you a little bit better. We are trying to see how you feel about various aspects of the case. And, I will be asking you questions and then the defense side will be asking you some questions. So just relax and feel at ease, alright?

MR. CORRELL: Alright.

MR. MATHIS: First of all, Mr. Correll, have you heard or read anything about this case?

MR. CORRELL: Yes, I have read something.

MR. MATHIS: What did you read, maybe the newspaper accounts?

MR. CORRELL: Yes I read an account in the Boone County Recorder that was about three weeks ago.

MR. MATHIS: Now, do you understand Mr. Correll that as a juror it would be your function to determine the evidence that you hear from the witness chair?

MR. CORRELL: Yes.

MR. MATHIS: Would you sir, if you were selected as a juror on this case, put aside whatever you have heard and read and base your judgment in this case solely upon the evidence which you hear in this courtroom?

MR. CORRELL: I think so.

MR. MATHIS: In other words, you would put aside what you have heard or read and start fresh and listen to the evidence?

MR. CORRELL: I think so.

MR. MATHIS: Now, Mr. Correll, this is a murder case and without going into the law of Kentucky to any great extent, let me just ask you some questions

regarding that and we will see how you feel about it. First of all, do you understand that in Kentucky murder is a capital offense, and by that I mean that it carries with it the possibility of the death penalty. Do you understand that?

MR. CORRELL: Yes.

MR. MATHIS: In Kentucky also we have what is called a two stage proceeding in a murder case. The first stage is called the guilt phase. We will assume now that you and the other jurors were selected to try this case. In the first phase of this trial you and your fellow jurors would listen then to the evidence concerning guilt or innocence and then you would be instructed on what the law is by the Court and then you would retire until you deliberate as to whether you feel the Defendant is guilty of the charge which is contained in the Indictment, do you understand that?

MR. CORRELL: Yes.

MR. MATHIS: I assume from your earlier questions that you could listen to the evidence and base your judgment on what you hear in this courtroom?

MR. CORRELL: I think so.

MR. MATHIS: Now, should you and your fellow jurors return a verdict of guilty as charged in

the Indictment, there would then immediately be a second phase of the proceedings and in that phase you would hear some more evidence regarding any aggravating or mitigating circumstances that might have occurred which might play upon you and your fellow jurors recommendation to the Court on the verdict or penalty, do you understand?

MR. CORRELL: Yes.

MR. MATHIS: Now, your options at that second phase, assuming that you found the Defendant guilty in the first phase, your options would be twenty years or more in the penitentiary, life in the penitentiary or death. Now, first of all, let me ask you, do you have any personal, political, religious, moral or other feelings which would prevent you from recommending to the Court the death penalty if you believe that the Defendant was guilty and if you felt from the evidence that it was warranted?

MR. CORRELL: Now religiously I might, yes.

[illegible]THIS: Okay, what is your religion?

[illegible]ORRELL: Baptist, protestant.

MR. MATHIS: Well, let me ask you about that. Do you feel that the imposition of the death penalty is a fit and proper function of government?

MR. CORRELL: I am undecided, sir, really.

MR. MATHIS: Do you have or are you in agreement with the legislature that a law providing for the imposition of the death penalty in certain cases is necessary?

MR. CORRELL: I am not sure, sir.

MR. MATHIS: Do you believe that your religious scrupples might prevent you from imposing the death penalty in any case?

MR. CORRELL: I don't know.

MR. MATHIS: Now, Mr. Correll, everybody is entitled to an opinion about these things and certainly you are entitled to yours. What we want you to do is to search your soul and try to come to grips with this very important question, do you understand?

MR. CORRELL: Yes.

MR. MATHIS: Do you believe that regardless of the case, no matter what the facts might be, that you because of your religious beliefs would not consider the death penalty as is required by law?

MR. CORRELL: I just don't know, sir.

MR. MATHIS: Well can you maybe think about it and give us some kind of an answer?

MR. CORRELL: Well I guess it is just one of those things you would have to cross when you

got to it, I guess, I don't know.

MR. MATHIS: Well what we are trying to decide, what we are trying to determine now, is how you feel about it so we will kind of know a little bit about what you might do in a given set of circumstances.

MR. CORRELL: I am, really I am undecided on it.

MR. MATHIS: Well, let me ask you this, are you open to the imposition of the death penalty, should the facts warrant it?

MR. CORRELL: Maybe, yes.

MR. MATHIS: Is your mind in any way closed to the imposition of the death penalty?

MR. CORRELL: No, I would say it isn't closed, but it - I am just undecided.

MR. MATHIS: As you sit there, think about a situtation perhaps where there was a terrorist attack on women and children, would you feel like the death penalty might be appropriate in that case?

MR. CORRELL: It is very possible, yes, very possible.

MR. MATHIS: But you are just not sure?

MR. CORRELL: I am not sure, no.

MR. MATHIS: In other words, you are

not sure you could follow the law, if you were selected?

MR. ZEVELY: Judge, I object to that, I don't think that is proper.

JUDGE NEACE: Follow the law?

MR. ZEVELY: No, I don't think -

JUDGE NEACE: I think it is very proper. I would expect him to follow the law.

MR. ZEVELY: Judge, I am saying that the question that he asked is not really housed in the legal term, the test for following the law.

JUDGE NEACE: Alright, let me ask the juror, Could you follow the law that the Court instructs you?

MR. CORRELL: Could I?

JUDGE NEACE: Yes sir, could you?

MR. CORRELL: Yes sir, I think so.

JUDGE NEACE: Will you?

MR. CORRELL: Sir?

JUDGE NEACE: And will you?

MR. CORRELL: I think so, yes.

JUDGE NEACE: Thank you.

MR. MATHIS: Mr. Correll, if the instructions which the Court gave you included as three options, twenty years or more in the penitentiary, life in the penitentiary, or death, you had indicated some religious feelings that might prohibit you from imposing the death penalty, now, assuming those were the instructions given to you, do you feel as you sit there that you could follow that instruction and impose the death penalty, could you do that?

MR. ZEVELY: Judge, that is not the legal test. I object.

JUDGE NEACE: I am not sure I understood the question. Let me see if I can ask him just a minute.

Mr. Correll, we realize and understand that different people have different feelings and that is everyone's right to express a different opinion to somebody else. You have indicated that because of religious feelings, I believe, you might have some hesitancy about imposing a death penalty, is that correct?

MR. CORRELL: Yes sir, there is some question in my mind, yes.

JUDGE NEACE: I understand, I am only

trying to find out exactly how you do feel. Let me put it in this question, if I can. Would your feelings absolutely preclude you from imposing a sentence of death under any circumstances, any circumstances that you can think of?

MR. CORRELL: I just don't know, sir, whether it would or not, really.

MR. MATHIS: May we approach the bench?

JUDGE NEACE: Do you think you can resolve that in your mind at this time? Can you think about it for a few minutes?

MR. CORRELL: Okay.

(At this point, the following Motion was heard in Chambers)

MR. MATHIS: Your Honor, we move to exclude this Juror for cause because he won't answer the questions one way or another. He says he is undecided whether he is for it, against it, whatever, and it is the Commonwealth's contention that that doesn't fall within the test, we just

got a juror that won't answer the questions.

MR. ZEVELY: Judge, before you exclude him for cause, I would like to be allowed to question him.

JUDGE NEACE: I am going to ask him that question again that I asked before. I think that is the test.

MR. ZEVELY: May I question him before you ask him the question?

JUDGE NEACE: Well, let me finish. You know the Court likes to get in on this a little bit too. I have been here all along Wilbur. Okay. I will let you question him. And I will reserve ruling on the motion.

(Discussion in Chambers concluded)

JUDGE NEACE: Mr. Correll, as I think Mr. Mathis says, there aren't any wrong answers to these

questions. We would like to know your position. Have you had time to think about the question the Court asked you?

MR. CORRELL: Well -

JUDGE NEACE: Let me repeat the question. Would your feelings that you have expressed absolutely preclude you from imposing a sentence of death under any possible circumstances?

MR. CORRELL: I am still undecided Judge. I just don't know about it. I just don't know.

JUDGE NEACE: Okay, any further questions?

MR. MATHIS: I pass for cause.

JUDGE NEACE: Well you have made your Motion which the Court reserved ruling on. Subject to your Motion I assume?

MR. MATHIS: Well I was simply trying to get it over there.

JUDGE NEACE: Alright, you pass to the Defendant.

MR. MATHIS: Right.

JUDGE NEACE: Alright.

BY MR. ZEVELY: Mr. Correll, the Court, in

essence, is asking you if there is any case where you could consider imposing the death penalty. For instance, if Hitler were on trial here today for killing all the Jews, you could consider imposing the death penalty in that case couldn't you?

MR. CORRELL: I would be undecided, sir. At this point.

MR. ZEVELY: Is it something - you say it is religious, your objection?

MR. CORRELL: Well I just -

MR. ZEVELY: Mr. Correll, let me put it this way, you haven't heard any of the evidence in this case and I realize that maybe your opinion is based upon your hesitancy to ask or to answer the questions based upon the fact that perhaps you are not sure that in the particular facts that a person is guilty or not, is that what your hesitancy is?

MR. CORRELL: No sir, I don't think so. It is that I was always taught and raised not to take a life and that sort of wears in the back of my mind.

MR. ZEVELY: We haven't said that you couldnot. You said -

MR.CORRELL: I am undecided, I just don't know whether I could or not.

MR. ZEVELY: Can you think of any fact

set up that would be so repugnant to you that you could impose the death penalty, any situation, see if you can think of one situation where you could.

MR. CORRELL: Well I can't really say that I could and I can't say that I couldn't.

MR. ZEVELY: Could you give me an example of one case where you could, no matter how bad the fact setup is. You make it up yourself.

MR. CORRELL: Well at this point right now, I wouldn't any but there very possibly could be, I am not saying that I wouldn't and I am not saying that I would.

MR.ZEVELY: So you are saying that there may very well possibly be a situation where you could, is that right?

MR. CORRELL: Well I just don't know.

MR. ZEVELY: Okay.

MR. CORRELL: I will put it this way, there might be situations where I might feel like it.

MR. ZEVELY: Okay, in that situation, could you do it?

MR. CORRELL: Well that I don't know.

MR. ZEVELY: Well you never know until you are put to the test.

MR. CORRELL: That is right.

MR. ZEVELY: But the Court would like you to answer the question either yes or no and be honest about your answer.

MR. CORRELL: I can't really answer a yes or no and be honest at this point right now.

JUDGE NEACE: Mr. Zevely, the Court wants him to be honest and that is all the Court expects.

MR. ZEVELY: I understand Judge.

JUDGE NEACE: If he can't answer the question yes or no, then he can't answer it.

(Mr. Gall confers with Mr. Zevely and Mr. Berger)

MR. GALL: Your Honor, can I get permission to ask this juror a question?

JUDGE NEACE: Alright, will you check it out with Mr. Zevely.

MR. GALL: I withdraw the Motion, Your Honor.

JUDGE NEACE: Alright, anything further gentlemen?

MR. ZEVELY: No.

MR. MATHIS: I renew my Motion.

JUDGE NEACE: Sustained.

Mr. Correll, the Court will excuse you for cause at this time. Thank you very much for being honest and candid with us. You are still a member of the jury panel of course and we will undoubtedly call you later in the term. I can't give you a date but it will be probably perhaps the first week in October sometime, but we will contact you and until that time you are excused and thank you very much.

MR.CORRELL: Certainly.

JUDGE NEACE: Mrs. Benson, call one more number, please.

MRS. BENSON: Number Forty (40), Ralph Sutter.

COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

STEVEN L. BESHEAR
Attorney General

CAPITOL BUILDING
Frankfort, KY 40601

MEMORANDUM

TO: All Commonwealth's Attorneys

FROM: James L. Dickinson
Assistant Attorney General

DATE: October 17, 1980

For your information I am sending you a copy of the Kentucky Supreme Court Opinion of Gall v. Commonwealth, in which the Supreme Court for the first time since 1970 affirmed the imposition of a death penalty. Accompanying the Opinion is a summary in which I have outlined the more important portions of the Opinion.

Please note the Court's language pertaining to the Witherspoon error. It is now a matter of Kentucky law that the reserving of a peremptory challenge will render harmless any Witherspoon error that may occur during the course of trial.

You should also read with care the language of the Court pertaining to the necessity of instructions on extreme emotional disturbance. In order to fully understand this case, it will be necessary for you to review the summary presented in Smith v. Commonwealth, 599 S.W.2d 900.

If there are any questions or comments, please do not hesitate to contact me. My telephone number is 502-564-4040.

Attachments (2)

SUMMARY
OF
GALL V. COMMONWEALTH

On September 2, 1980, the Supreme Court for the first time since 1970 affirmed the imposition of a death penalty. In this case the Boone Circuit Court sentenced Eugene Gall to die in the electric chair for the rape and murder of Lisa Jensen, a twelve-year-old girl. The Supreme Court's decision is a significant milestone in criminal justice.

Although the Opinion of the Supreme Court is important in that it affirmed the constitutionality of KRS 532.025, see page 31, it is also significant for its treatment of several issues that have caused a considerable amount of confusion for the prosecutors. The purpose of this summary is to briefly outline the Court's Opinion as it relates to (1) the jury selection process, (2) the type of murder instruction that is needed when the defendant is relying on an insanity defense, and (3) the proper procedure that should be employed at the penalty stage of the trial.[1]

Jury Selection

The first major issue which confronted the Court was whether a juror had been properly excluded under Witherspoon v.

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[1] It is strongly suggested that you review the summary that was prepared by this office when Smith v. Commonwealth, 599 S.W.2d 900 (1980), was decided. Taken together, these two Opinions represent a comprehensive review of those issues which are commonly raised on appeal.

Illinois, 391 U.S. 510 (1968). In this case the prospective juror was unable to state whether he could consider the imposition of the death penalty if Gall were found guilty of murder. In essence the juror was undecided and would not, despite repeated questioning by both the court and the attorneys, give a definite answer as to whether his conscience would allow him to consider without prejudice the range of possible punishments. The juror was finally excused for cause. On appeal, the appellant argued that the removal for cause of this juror was error and that the death penalty must be reduced to a life sentence.

In resolving this issue, the Court, in effect, considered three questions. They were: (1) Was it error to excuse a veniremen because he was unable to decide whether he could consider the death penalty? (2) Since the jury was merely recommending the penalty and not imposing the punishment, was the Witherspoon test applicable? and (3) If there was error, was it rendered harmless by the fact that the Commonwealth had not utilized all of its peremptory challenges?

In answering the first question, the Court said:

> "It occurs to us that if a prospective juror will not say whether he can or cannot consider without prejudice the options from which he must choose in arriving at a verdict, he should be disqualified. The very least assurance to which the public is entitled is that he will exercise an honest discretion in resolving each issue submitted to him. Yet the effect of such equivocation is that on this important issue the juror will not

> give an assurance that he is able to exercise any discretion because he is not sure that his mind is open at the beginning. Surely it is elementary that a juror must be able to enter upon his duties with an open mind. It would seem beyond cavil that any court in the country would dismiss a prospective juror who could not say whether he would or would not be able to consider a verdict resulting in a prison sentence. The reason is that such a juror could not be an impartial juror, and it occurs to us that fundamental justice guarantees to the public impartial jurors in capital cases as well as in less serious proceedings." (Opinion, pp. 9-10.)

The Court then embarked upon a discussion of the recent United States Supreme Court decision of Adams v. Texas, ___ U.S. ___ (1980).[2] The Kentucky Court ultimately concluded that the Witherspoon standard was still applicable even though the jury was only recommending a punishment. The Court, however, as dicta expressed the following thought as to the imposition of punishment by the trial judge:

> "The trial court cannot sentence a defendant to death unless the jury, by a unanimous verdict, has found beyond a reasonable doubt the existence of one or more of the aggravating circumstances listed in KRS 532.025(2)(a). KRS 532.035(3). There being no requirement that the trial judge abide by the jury's recommendation, once the jury has found an aggravating circumstance the trial judge has the discretion either to sentence the defendant to death, or to life imprisonment, or to a term of not less than 20 years in prison." Opinion, pp. 10-11. (Emphasis added.)

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2 One of the questions considered by the Supreme Court was whether under a bifurcated procedure the test set forth in Witherspoon was applicable to the excusing of jurors.

Although it is not crystal clear, it would appear that once the jury has found beyond a reasonable doubt an aggravating circumstance, the trial judge is free to impose any of the possible punishments, including death, despite the jury's recommendations. Thus, as a matter of tactics, it is important that the jury be instructed to first determine whether there exists beyond a reasonable doubt an aggravating circumstance. If the jury does make such determination, this finding should be written down on the prescribed form before the jury proceeds to consider the punishment that should be imposed. This point is important because if the jury imposes a sentence other than death despite its written determination as to the existence of an aggravating circumstance, the trial judge would have available the option of imposing the death penalty in lieu of the jury's recommendations.

Recently in The Kentucky Prosecutor I pointed out that the prosecutor should, if at all possible, reserve a peremptory challenge. In its Opinion, the Supreme Court held:

> "It will be recalled that the Commonwealth left one of its peremptory challenges unexercised. Surely, had the trial court denied its motion to strike Correll for cause, it would have used that challenge. Under similar circumstances the Supreme Court of Georgia held possible Witherspoon errors to have been harmless. Alderman v. State, Ga., 246 S.E. 2d 642 (1978). See also State v. George, La., 346 So. 2d 694 (1977). We reach the same conclusion in this case." Opinion, pp. 11-12.

Thus it is now clear that the Court will find a Witherspoon error to be harmless beyond a reasonable doubt if the prosecutor

has not used all of his peremptory challenges.[3]

Insanity and Murder Instructions

At trial Eugene Gall maintained that he could not remember the events that led to Lisa Jansen's death. There was a considerable amount of psychological testimony that Gall was insane at the time of the offense. The trial court offered a partial instruction on the element of "absence of extreme emotional disturbance" in that it did not instruct the jury to consider the reasonableness of the acts from the viewpoint of the actor under the circumstances as he believed them to be. On appeal the appellant argued that the omission of this language was fatal and that his conviction should be reversed.

Before proceeding to the Court's analysis of this issue, it is important to note that Gall cannot be fully understood by the prosecutor unless he is also familiar with Smith v. Commonwealth, 599 S.W.2d 900. For a considerable period of time the Office for Public Advocacy has maintained on appeal that the absence of extreme emotional disturbance was an element of murder and that due process required a murder instruction encompassing this element regardless of the evidence. In Smith the Supreme Court

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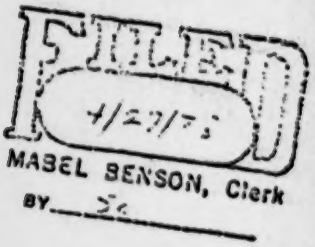
[3] A more detailed treatment of tactics in jury selection was presented in the July issue of The Kentucky Prosecutor.

BOONE CIRCUIT COURT



COMMONWEALTH OF KENTUCKY PLAINTIFF

VS. MOTION

EUGENE WILLIAM GALL, JR. DEFENDANT

* * * * * * * * * * * *

Comes the Commonwealth and moves the Court for an Order allowing the Commonwealth to obtain the following samples from the above-named defendant;

1. Sufficient quantity of hair from various portions of the defendant's head to enable the Commonwealth to do an analysis of the defendant's hair characteristics;

2. Sufficient swabbings of the defendant's saliva to enable the Commonwealth to perform tests to determine the defendant's saliva characteristics;

3. A full set of color, nude photographs of the defendant; and samples of pubic hair;

4. A full case set of finger and hand prints; and

5. A sufficient quantity of the defendant's blood sufficient to enable the Commonwealth to perform an analysis of the defendant's blood characteristics.

Willie Mathis, Jr.

WILLIE MATHIS, JR.
COMMONWEALTH ATTORNEY

NOTICE

The above motion will be heard at the convenience of the Court on the 27th day of April, 1978.

CERTIFICATE

I, Willie Mathis, Jr., certify that a copy of the above motion was this 27 day of April, 1978, served upon the defendant through his attorney, Hon. Wilbur Zevely, 226 Main Street, Florence, Kentucky.

Willie Mathis

WILLIE MATHIS, JR.
COMMONWEALTH ATTORNEY

FILED
4/27/78
MABEL BENSON, Clerk
BY S C

AFFIDAVIT

Comes Jerry Keith, Detective, Kentucky State Police, after being duly cautioned, sworn and states:

1. That the Commonwealth needs samples of the defendant's hair, saliva, photographs, finger and hand prints and blood for purposes of completing their investigation into the alleged rape and death of Lisa Jansen;

2. That the investigation and the ends of justice cannot be served without the above-mentioned items because of the nature of the alleged offenses of rape and murder;

3. That the purpose of obtaining these items is not to harass or to intimidate the defendant;

Further Affiant saith naught.

Det. Jerry F Keith
JERRY KEITH, Detective
Kentucky State Police

STATE OF KENTUCKY)
)
COUNTY OF BOONE)

Subscribed and sworn to before me by Jerry Keith on this 27 day of April, 1978.

My commission as a Notary Public expires on the 8 day of August, 1981.

Willie Mathis
NOTARY PUBLIC

A-68

FILED
4/27/78
MABEL BENSON, Clerk
BY S

AFFIDAVIT

Comes Willie Mathis, Jr., duly elected Commonwealth Attorney for the 54th Judicial District, after being duly cautioned, sworn and states;

1. That the Commonwealth needs samples of the defendant's hair, saliva, photographs, finger and hand prints and blood for purposes of completing their investigation into the alleged rape and death of Lisa Jansen;

2. That the investigation and the ends of justice cannot be served without the above-mentioned items because of the nature of the alleged offenses of rape and murder;

3. That the purpose of obtaining these items is not to harass or to intimidate the defendant;

Further Affiant saith naught.

Willie Mathis

WILLIE MATHIS, JR.
COMMONWEALTH ATTORNEY

STATE OF KENTUCKY)
)
COUNTY OF BOONE)

Subscribed and sworn to before me by Willie Mathis, Jr., on this 27 day of April, 1978.

My commission as a Notary Public expires on the 7 day of Feb, 1982.

Jane Feb

NOTARY PUBLIC

A-69

JUDGE NEACE: Alright.

What about the matter of bail, gentlemen?

MR. MATHIS: Your Honor, the Commonwealth recommends that the Defendant be held without bail pending trial.

JUDGE NEACE: Mr. Zevely?

MR. ZEVELY: Your Honor, I have nothing to say as with regards to bail since there are other pending charges across this State and other States.

JUDGE NEACE: Alright, the Defendant be detained in custody pending trial, no bail.

Anything further, gentlemen?

MR. MATHIS: Yes, Your Honor. The Commonwealth has several Motions at this time and I believe Mr. Zevely has been kind enough to waive notice on these Motions.

The first Motion, Your Honor, the Commonwealth has several parts. The Commonwealth moves for an Order allowing the Commonwealth to obtain the following samples from Mr. Gall; sufficient quantity of hair from various portions of his head to enable the Commonwealth to do an analysis of the Defendant's hair characteristics; sufficient swabbings of Defendant's saliva to enable the Commonwealth to run tests to

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determine the Defendant's saliva characteristics; a full set of color nude photographs of the Defendant; samples of pubic hair; and a full case set of finger and hand prints; a sufficient quantity of Defendant's blood to enable the Commonwealth to perform an analysis of the Defendant's blood characteristics. And I have attached to the Motion, Your Honor, citations of Garr vs. Commonwealth, 463 S.W. 2d,109 and another case the case of Newman vs. Stinson, 489 S.W.2d, 826. The citation and also accompanying that Your Honor, is the Affidavit of myself as Commonwealth Attorney and the Affidavit of State Police Detective, Jerry Keith.

JUDGE NEACE: Mr. Zevely.

MR. ZEVELY: Your Honor, we do waive notice of the motion that Mr. Mathis has. We do not believe that the Affidavits attached are sufficient under the law to impel the Commonwealth to some of these samples and for the record, we enter our opposition to these Motions.

JUDGE NEACE: In what manner do you say the Affidavits are deficient?

MR. ZEVELY: As far as the saliva and the hair is concerned, Judge, we have no objections to that at all, or to the fingerprints. As far as the

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blood is concerned the Affidavits do not show a reason why that they would like these samples. There is nothing other than the fact that the reason is that they need the samples to complete their investigation. We don't believe that this is sufficient.

JUDGE NEACE: Does the Commonwealth have any comment on that?

MR. MATHIS: Your Honor, as far as pre-trial order is concerned the Commonwealth believes that no cause need be shown except they supply the Affidavits for the record. It is simply in the nature of physical evidence, Your Honor.

JUDGE NEACE: Alright, I think the Motion is well founded, it is sustained.

Anything further?

MR. MATHIS: Your Honor, the provisions of KRS 532.050, this time for the record I would like to notice and would like the record to note that I have given Mr. Zevely a Notice that the Commonwealth intends to show an aggravated circumstance in the murder of Lisa Jansen, to wit; rape in first degree by the Defendant, Eugene Williams Gall upon the person of Lisa Jansen.

MR. ZEVELY: For the record, we acknowledge

BOONE CIRCUIT COURT

COMMONWEALTH OF KENTUCKY PLAINTIFF

VS. ORDER

EUGENE WILLIAM GALL, JR. DEFENDANT

* * * * * * * * * * * *

Upon motion of the Commonwealth having been brought on for hearing before the Court this 27th day of April, 1978; the Commonwealth having been represented through the Hon. Willie Mathis, Jr., attorney, and the defendant having been present and represented by the Hon. Wilbur Zevely, and the Court being otherwise sufficiently advised,

Now, therefore, it is hereby considered ORDERED and adjudged as follows:

1. That the Commonwealth may obtain samples from various portions of the head of the defendant, said samples to be obtained in such a way as to provide the entire hair including the folicle which is attached to and beneath the scalp;

2. That the Commonwealth may obtain swabs of saliva from the mouth of the defendant; and public hair samples;

3. That the Commonwealth may obtain a complete set of nude photographs of the defendant;

4. That the Commonwealth may obtain a full print case set of prints from the hands and fingers of the defendant, both left and right hands;

5. That the Commonwealth may obtain a sufficient sample of the defendant's blood to enable it to make an analysis of his blood type and groupings.

IT IS FURTHER ORDERED that the following conditions are to be observed by the Commonwealth:

1. That the defendant's attorney may be present during each of the proceedings ordered above if he desires to be present;

2. That the blood samples shall be obtained from the defendant' by a physician, a licensed registered or practical nurse, or a duly qualified medical technologist;

3. That this Order is effective immediately and the defendant shall present himself forthwith in compliance with the terms of this Order.

Given under my hand this
27th day of April 1978

SAM NEACE, JUDGE
BOONE CIRCUIT COURT

CERTIFICATE

I, Mabel Benson, Clerk of The Boone Circuit Court, hereby certify that I have mailed a copy of the foregoing order and notice to all parties hereto at their last known addresses or to their counsel of record this 27 day of April, 19 78

BOONE CIRCUIT CLERK

ENTERED IN DOCKET

A-74

NO. 80-6034

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

EUGENE WILLIAM GALL, JR. — PETITIONER

V.

COMMONWEALTH OF KENTUCKY — RESPONDENT

On Petition for Writ of Certiorari to the Supreme Court of Kentucky

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STEVEN L. BESHEAR
ATTORNEY GENERAL

JAMES L. DICKINSON
ASSISTANT ATTORNEY GENERAL

K. GAIL LEECO
ASSISTANT ATTORNEY GENERAL
Capitol Building
Frankfort, Kentucky 40601
(Telephone: 502-564-7600)

COUNSEL FOR RESPONDENT.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

I.

WHETHER THE TRIAL COURT PROPERLY EXCUSED A VENIREMAN WHO WAS UNABLE TO ASSURE THE TRIAL COURT OF HIS ABILITY TO CONSIDER THE POSSIBLE IMPOSITION OF THE DEATH PENALTY FOR THE OFFENSE COMMITTED BY THE PETITIONER.

II.

WHETHER THE EXCLUSION OF THE VENIREMAN, IF ERRONEOUS UNDER WITHERSPOON V. ILLINOIS, IS RENDERED HARMLESS BEYOND A REASONABLE DOUBT UNDER CHAPMAN V. CALIFORNIA BY THE EXISTENCE OF A PEREMPTORY CHALLENGE WHICH WAS NOT EXERCISED AT TRIAL BY THE COMMONWEALTH.

III.

WHETHER BLOOD, HEAD HAIR, PUBIC HAIR AND SALIVA SAMPLES CAN BE SEIZED FROM A DEFENDANT WHEN SUCH SEIZURE IS PURSUANT TO A COURT ORDER BASED UPON AFFIDAVITS THAT SAMPLES WERE NEEDED TO COMPLETE THE INVESTIGATION OF RAPE AND MURDER.

IV.

WHETHER THERE EXISTS AN ADEQUATE INDEPENDENT STATE GROUND WHICH WOULD BAR A REVIEW BY THIS COURT OF THE PROPRIETY OF THE SEIZURE OF THE HEAD HAIR, PUBIC HAIR AND SALIVA SAMPLES.

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OPINION BELOW

The opinion below from the Supreme Court of Kentucky is styled Eugene William Gall, Jr. v. Commonwealth of Kentucky and is published as modified at 607 S.W.2d 97 (Ky., 1980). On October 14, 1980, the Supreme Court of Kentucky denied the petitioner's request for a rehearing and issued its mandate, which ordered that the judgment of the Boone Circuit Court should be carried into execution on the fifth Friday following the date of issuance of the mandate.

On October 31, 1980, the Supreme Court of Kentucky entered an order staying the execution of the mandate. On December 9, 1980, Justice Potter Stewart entered an order which continued the stay of the mandate until such time as the Court could consider the petitioner's application for a writ of certiorari.

It should also be noted that the Supreme Court of Kentucky on December 9 entered into the record a corrected page which modified page 22 of the slip opinion.

The opinion of the Supreme Court of Kentucky, the modifications and the corrected page, as well as the order denying the petition for rehearing and the mandate are correctly set out in the petitioner's Appendix.

JURISDICTION

Petitioner's application to involve the jurisdiction of this Court has fulfilled the initial prerequisites of 28 U.S.C. 1257(3). The petition for a writ of certiorari, however, should be denied since the petitioner has failed to adequately demonstrate a conflict of such magnitude as to warrant a review of the opinion below. See Rule 17.

Furthermore, it should be noted that as to the propriety of the seizure of head hair, pubic hair and saliva samples, an objection was not entered to their seizure; the objection made by the trial counsel for the petitioner was directed solely towards the seizure of the blood sample.

In its review of this issue the Supreme Court of Kentucky expressly declined to review the merits of whether the hair and saliva samples were properly seized.

This Court has consistently held that the existence of an independent state ground precludes review of a related federal question. Henry v. State of Mississippi, 379 U.S. 443 (1965). In this case there is obviously an adequate and independent state ground which bars review of this particular issue.

The petition for a writ of certiorari should be denied.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The petitioner has correctly stated that the constitutional provisions involved in this petition are the Due Process Clause of the Fourteenth Amendment, the Sixth Amendment, and the Fourth Amendment.

Respondent submits that full consideration of the petitioner's application is dependent upon Criminal Rule (RCr) 9.40, which provides:

> "(1) If the offense charged is a felony, the Commonwealth is entitled to five (5) peremptory challenges and the defendant or defendants jointly to eight (8) peremptory challenges. If the offense charged is a misdemeanor, the Commonwealth is entitled to three (3) peremptory challenges and the defendant or defendants jointly to three (3) peremptory challenges.

"(2) If one (1) or two (2) additional jurors are called, the number of peremptory challenges allowed each side shall be increased by one (1).

"(3) If more than one defendant is being tried, the court may at its discretion allow additional peremptory challenges to each defendant."

COUNTERSTATEMENT OF THE CASE

This action originated in the Boone Circuit Court, which sentenced the petitioner to death by electrocution. In a bifurcated proceeding a jury found the petitioner to be guilty of murdering Lisa Jansen, a twelve-year-old girl. Pursuant to law, a presentencing hearing was conducted. After hearing evidence in aggravation and mitigation, the jury returned written findings which found beyond a reasonable doubt that the offense was aggravated by the fact that Gall murdered Lisa Jansen during the commission of rape. The jury did not find any mitigating factors, statutory or otherwise, and recommended that Gall receive the death penalty.

Eugene William Gall, Jr., was indicted on April 27, 1978, and charged with murdering Lisa Jansen on or about April 5, 1978. On that day the Commonwealth presented to the court a variety of motions, including a motion supported by affidavits to obtain samples of Gall's head hair, pubic hair, saliva and blood. T.R. 5. The court granted this motion but qualified its order with the requirement that defense counsel be present during the sample procurement and that the blood samples be obtained by competent medical personnel. Defense counsel expressly stated that he did not have any objection to the procurement of the saliva and hair as samples for testing. T.E. 4.

At the petitioner's request the voir dire was individually conducted. A review of the entire record of the voir

dire indicates that the questioning was extremely lengthy. The record of the voir dire is nearly 1100 pages.

Of the fifty-two veniremen interviewed by the parties, seventeen were excused because they had formulated an opinion as to guilt or innocence. Most of the veniremen who were excused for this reason commented that they had children of about the same age as Lisa Jansen. See T.E. Vol. VI, 856. In other cases it was clear that formulation of an opinion was somewhat self-serving. See T.E. Vol. VI, 761-767.

The Commonwealth was entitled by statute to five peremptory challenges and received two additional challenges for the two alternates that were seated. During the course of the voir dire the Commonwealth's Attorney exercised six of the Commonwealth's strikes. The petitioner was entitled to eight peremptory challenges and received two additional challenges for a total of ten.

At the conclusion of the voir dire, the panel consisted of David Osborne, John Reid, Lloyd Vittitoe, Donna Wilmhoff, Ernestine Miller, Ralph Wayman, Mary Lou Epley, Gary Barton, Mary Perry, Barbara Perry, Michael Wolf, Douglas Palmer, and Bernice Utz.

During the voir dire three veniremen were excused for cause due to their inability to consider the death penalty as a possible punishment during the penalty phase of the trial. They were Virginia Freemon, Joyce Smith and David Correll.

In his petition for writ of certiorari the petitioner focuses his argument on the single contention of whether the trial court erred in excusing for cause venireman David Correll.

At the voir dire Mr. Correll was initially asked as to whether he had formulated an opinion as to guilt or innocence.

Correll thought he could set aside his opinion. T.E. Vol. VII, 963. Without inquiring further, Mathis turned to the questions concerning the imposition of the death penalty. During the course of questioning, it immediately became apparent that Correll was deeply concerned about the issue. The following exchange illustrates the attempt by the Commonwealth to clarify Mr. Correll's position:

> "MR. MATHIS: Do you believe that regardless of the case, no matter what the facts might be, that you because of your religious beliefs would not consider the death penalty as is required by law?
>
> "MR. CORRELL: I just don't know, sir.
>
> "MR. MATHIS: Well can you maybe think about it and give us some kind of an answer?
>
> MR. CORRELL: Well I guess it is just one of those things you would have to cross when you got to it, I guess, I don't know.
>
> "MR. MATHIS: Well what we are trying to decide, what we are trying to determine now, is how you feel about it so we will kind of know a little bit about what you might do in a given set of circumstances.
>
> "MR. CORRELL: I am, really I am undecided on it.
>
> "MR. MATTHIS: Well, let me ask you this, are you open to the imposition of the death penalty, should the facts warrant it?
>
> "MR. CORRELL: Maybe, yes.
>
> "MR. MATHIS: Is your mind in any way closed to the imposition of the death penalty?
>
> MR. CORRELL: No, I would say it isn't closed, but it - I am just undecided.
>
> "MR. MATHIS: As you sit there, think about a situation perhaps where there was a terrorist attack on women and children, would you feel like the death penalty might be appropriate in that case?
>
> "MR. CORRELL: It is very possible, yes, very possible.
>
> "MR. MATHIS: But you are just not sure?

"MR. CORRELL: I am not sure, no." T.E. Vol. VII, 966-967.[1]

Upon motion by the Commonwealth, the parties went in chambers. The Commonwealth presented the following motion:

> "Your Honor, we move to exclude this Juror for cause because he won't answer the questions one way or another. He says he is undecided whether he is for it, against it, whatever, and it is the Commonwealth's contention that that doesn't fall within the test, we just got a juror that won't answer the questions." T.E. Vol. VII, 970-97.

The court reserved its ruling and concluded its in-chambers discussion. Upon re-entering the courtroom, Judge Neace asked the following question and obtained the following response:

> "JUDGE NEACE: Let me repeat the question. Would your feelings that you have expressed absolutely preclude you from imposing a sentence of death under any possible circumstances?
>
> "MR. CORRELL: I am still undecided Judge. I just don't know about it. I just don't know." T.E. Vol. VII, 972.

Counsel, for the petitioner then attempted to clarify Correll's position. As a response, Correll said he could not think of a situation where he would impose the death penalty. Correll, however, said there might be a situation where "I might feel like it." T.E. Vol. VII, 974. Correll concluded by saying that he couldn't answer the question "yes or no." T.E. Vol. VII, 975.

The court granted the Commonwealth's motion to excuse Correll for cause. T.E. Vol. VII, 976. Gall was subsequently convicted of murder and the trial court pursuant to the jury recommendation imposed a sentence of death by electrocution.

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1 The petitioner has included in his Appendix the entire transcript of the voir dire of Mr. Correll.

On direct appeal, the Supreme Court of Kentucky first considered validity of the seizure of the samples and held:

> "Counsel for Gall objected only with respect to blood sample, stating that he had no objection as to the hair, saliva and fingerprints. Thus we consider only the matter of the blood sample.
>
> * * *
>
> "A divided court in Schmerber v. California, 384 U.S. 757 (1966), held it permissible for a police officer acting with probable cause under exigent circumstances to have a blood sample taken by a physician from an arrested drunk-driving suspect. The 5th Amendment protection against self-incrimination was held inapplicable because the majority of the court did not consider a surrender of blood as having testimonial import. 384 U.S. at p. 765. The 4th and 14th Amendment protection against unreasonable search and seizure did apply, but was held not to have been violated. In the absence, however, of exigent circumstances justifying immediate action without a warrant, the court indicated that the same precautions would be required as in the instance of a search warrant. That is, the justification must be determined by an informed, detached and deliberate judicial act. 384 U.S. at p. 770.
>
> "In this instance the trial court had before it an indictment charging Gall with the murder of Lisa Jansen and affidavits by the Commonwealth's Attorney and a detective of the Kentucky State Police stating that the physical samples were needed 'for purposes of completing their investigation into the rape and death of Lisa Jansen.' It seems to us that the relevance and importance of such evidence in a case involving rape are self-evident. We therefore hold that the order granting permission to obtain it from Gall's person was reasonable and was a valid basis for the subsequent admission of testimony derived from its analysis. Cf. Thompkins v. State, Ind., 383 N.E.2d 347, 351 (1979). Slip Opinion, pp. 4-5.

In considering the question of whether Mr. Correll was properly excused for cause, the Court first noted:

> "RCr 9.40 gives the Commonwealth six and the defense nine peremptory challenges in a felony case in which an alternate juror or jurors are impaneled. In this instance the trial court allowed each side one more. The Commonwealth used six of its seven strikes

and the defense exercised its entire 10." Slip Opinion, p. 8.

The court below then turned its attention to whether the removal for cause violated this Court's standard for exclusion of a venireman in a capital case as enunciated in Witherspoon v. Illinois, 391 U.S. 510 (1968), and Adams v. Texas, ___ U.S. ___, 100 S.Ct. 2521 (1980).[2] In holding that the trial court did not err in removing Mr. Correll for cause, the Supreme Court said:

> "It occurs to us that if a prospective juror will not say whether he can or cannot consider without prejudice the options from which he must choose in arriving at a verdict, he should be disqualified. The very least assurance to which the public is entitled is that he will exercise an honest discretion in resolving each issue submitted to him. Yet the effect of such equivocation is that on this important issue the juror will not give an assurance that he is able to exercise any discretion because he is not sure that his mind is open at the beginning. Surely it is elementary that a juror must be able to enter upon his duties with an open mind. It would seem beyond cavil that any court in the country would dismiss a prospective juror who could not say whether he would or would not be able to consider a verdict resulting in a prison sentence. The reason is that such a juror could not be an impartial juror, and it occurs to us that fundamental justice guarantees to the public impartial jurors in capital cases as well as in less serious proceedings." Slip Opinion, pp. 9-10.

The Court also considered the impact of this Court's recent decision in Adams v. Texas, supra, and stated:

> "So it may be seen that the jury's function with regard to the ultimate sentence is more limited here than it was under the Texas

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2 Adams was rendered after the parties had filed into the record their briefs on appeal. The Court, however, granted both counsel for the petitioner and the Commonwealth their requests to file supplemental briefing as to the applicability of Adams to the case at bar.

statute in Adams. Nevertheless, its determination that an aggravating circumstance existed is a sine qua non, and its recommendation of the death sentence, though not binding on the trial judge, obviously carries great weight. Hence we do not see any significant difference between out statutes ancd those of Texas insofar as the applicability of Adams may be concerned. There is, however, a dispositive distinction, we feel, between a prospective juror who admits he may be affected by the death penalty, or does not know whether he would or would not, and one who is unable to say even that he can consider that option. It is our opinion, therefore, that Adams does not apply to this case, and that Witherspoon does not require the acceptance of a juror who is unable to say that he can exercise an open-minded discretion with regard to the vital issues he will be called upon to decide. Cf. State v. Ross, La., 343 So.2d 722, 726-7 (1977)." Slip Opinion, p. 11.

Finally, the Court noted that the Commonwealth had left to it one peremptory challenge which was not exercised at trial. The Court as an alternative ground concluded:

". . . Surely, had the trial court denied its motion to strike Correll for cause, it would have used that challenge. Under similar circumstances the Supreme Court of Georgia held possible Witherspoon errors to have been harmless. Alderman v. State, Ga., 246 S.E.2d 642 (1978). See also State v. George, La., 346 So. 2d 694 (1977). We reach the same conclusion in this case." Slip Opinion, pp. 11-12.

After a full consideration of the petitioner's arguments, the Supreme Court reviewed the sentence of death and affirmed the conviction and the judgment of the Boone Circuit Court.

The petitioner now urges this Court to issue a writ of certiorari to the Supreme Court of Kentucky. Additional facts as needed will be presented below.

REASONS FOR NOT GRANTING THE WRIT

I.

DECISION OF THE COURT BELOW AS TO THE EXCLUSION OF DAVID CORRELL IS IN ACCORDANCE WITH THE OPINIONS OF THIS COURT.

Petitioner asserts in his application that his death sentence should be reversed because a juror was improperly excluded in violation of Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), and its progeny. As can be seen from the facts of this case, Mr. Correll was excused from the venire due to his inability to answer the questions posed to him by the Commonwealth and the trial court as to his ability to fairly consider all of the options available as punishment in the event Mr. Gall was found guilty of murder. In support of this contention a review of the voir dire and Mr. Correll's answers is in order.

The voir dire of Mr. Correll extended over fifteen pages of trial transcript. (T.E. 961-196.) Under questioning by the Commonwealth's Attorney, Mr. Correll just could not give an answer as to whether he could consider the imposition of the death penalty:

> "MR. MATHIS: Do you feel that the imposition of the death penalty is a fit and proper function of government?
>
> "MR. CORRELL: I am undecided, sir, really.
>
> "MR. MATHIS: Do you have or are you in agreement with the legislature that a law providing for the imposition of the death penalty in certain cases is necessary?
>
> "MR. CORRELL: I am not sure, sir.
>
> "MR. MATHIS: Do you believe that your religious scruples might prevent you from imposing the death penalty in any case?
>
> "MR. CORRELL: I don't know.
>
> "MR. MATHIS: Do you believe that regardless of the case, no matter what the facts might be, that you because of your religious beliefs would not consider the death penalty as is required by law?
>
> "MR. CORRELL: I just don't know, sir.
>
> "MR. MATHIS: Well can you maybe think about it and give us some kind of an answer?

"MR. CORRELL: Well I guess it is just one of those things you would have to cross when you got to it, I guess, I don't know.

"MR. MATHIS: Well what we are trying to decide, what we are trying to determine now, is how you feel about it so we will kind of know a little bit about what you might do in a given set of circumstances.

"MR. CORRELL: I am, really I am undecided on it." T.E. 965-967. (Emphasis added.)

Even when Mr. Mathis hypothesized the extreme case of a terrorist attack on women and children, Mr. Correll could not say that the death penalty would be appropriate. His answer was, "I am not sure." T.E. 967. In an attempt to gain an inkling as to whether Mr. Correll would consider the death penalty, the trial court questioned him:

"JUDGE NEACE: Mr. Correll, we realize and understand that different people have different feelings and that is everyone's right to express a different opinion to somebody else. You have indicated that because of religious feelings, I believe, you might have some hesitancy about imposing a death penalty, is that correct?

"MR. CORRELL: Yes sir, there is some question in my mind, yes.

"JUDGE NEACE: I understand, I am only trying to find out exactly how you do feel. Let me put it in this question, if I can. Would your feelings absolutely preclude you from imposing a sentence of death under any circumstances, any circumstances that you can think of?

"MR. CORRELL: I just don't know, sir, whether it would or not, really." T.E. 969-970. (Emphasis added.)

After Mr. Correll was given time to think about his answer, he still could not say what he would do under any circumstances:

"JUDGE NEACE: Let me repeat the question. Would your feelings that you have expressed absolutely preclude you from imposing a sentence of death under any possible circumstances?

"MR. CORRELL: I am still undecided Judge. I just don't know about it. I just don't know." T.E. 972. (Emphasis added.)

Even defense counsel could not elicit an answer from Mr. Correll:

> "MR. ZEVELY: So you are saying that there may very well possibly be a situation where you could, is that right?
>
> "MR. CORRELL: Well, I just don't know.
>
> "MR. ZEVELY: Okay.
>
> "MR. CORRELL: I will put it this way, there might be situations where I might feel like it.
>
> "MR. ZEVELY: Okay, in that situation, could you do it?
>
> "MR. CORRELL: Well that I don't know.
>
> "MR. ZEVELY: Well you never know until you are put to the test.
>
> "MR. CORRELL: That is right.
>
> "MR. ZEVELY: But the Court would like you to answer the question either yes or no and be honest about your answer.
>
> "MR. CORRELL: I can't really answer a yes or no and be honest at this point right now." T.E. 974-975. (Emphasis added.)

Mr. Correll just could not give any answer to the question of whether he would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before him. No one could tell from his answers whether he would or would not consider the death penalty. His exclusion for cause did not violate Witherspoon v. Illinois, supra.

In Witherspoon, this Court stated that the question presented to it for its consideration was a narrow one:

> ". . . It does not involve the right of the prosecution to challenge for cause those prospective jurors who state that their reservations about capital punishment would prevent them from making an impartial decision as to the defendant's guilt. Nor does it involve the State's assertion of a right to exclude from the jury in a capital case those who say that they could never vote to

> impose the death penalty or that they would refuse even to consider its imposition in the case before them. For the State of Illinois did not stop there, but authorized the prosecution to exclude as well all who said that they were opposed to capital punishment and all who indicated that they had conscientious scruples against inflicting it." Witherspoon, supra at 513-514.

In holding that the exclusion of a potential juror from a capital case due to his generalized objections to the imposition of the death penalty would violate the Sixth Amendment, this Court said in footnote 21:

> ". . . The most that can be demanded of a venireman in this regard is that he be willing to consider all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings. If the voir dire testimony in a given case indicates that veniremen were excluded on any broader basis than this, the death sentence cannot be carried out even if applicable statutory or case law in the relevant jurisdiction would appear to support only a narrower ground of exclusion." Witherspoon, supra at 522.

At the voir dire inquiry Mr. Correll was simply unable or unwilling to state whether he would consider the imposition of the death penalty. The state was not requesting an assurance that he "would" impose the death sentence but whether he "could" after hearing all the evidence inflict the penalty. When the entire colloquy is examined, it is clear that Mr. Correll was unable to articulate this assurance and thus he was properly excused. In other words, it is the respondent's contention that Witherspoon is not even applicable to this case. In Witherspoon this Court held that it would be error of a constitutional magnitude to excuse a juror because he voiced a conscientious scruple to the imposition of the death penalty. In this case Mr. Correll was unable to answer the questions of the Commonwealth and he was excused, not because

of any conscientious scruples but because he was unable to give any assurance as to his ability to impartially consider all of the available penalties.

The opinion of the Supreme Court of Kentucky does not conflict with the opinions rendered by this Court. David Correll was properly excused. The petition should be denied.

II.

ANY CONFLICT BETWEEN THE OPINION OF THE COURT BELOW AND OTHER VARIOUS COURTS OF LAST RESORT IS NOT OF SUCH MAGNITUDE AS TO WARRANT THE ISSUANCE OF A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY.

Rule 17.1(b) provides in part:

> ".1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> "(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals."

In an effort to justify his request in accordance with this provision, the petitioner alleges that the opinion of the Supreme Court of Kentucky conflicts with the opinions of various courts of last resort. The petitioner principally relies on People v. Goodridge, 76 Cal.Rpt. 421, 452 P.2d 637 (Calif. 1969), and State v. Monk, 286 N.C. 509, 212 S.E.2d 125 (N.C. 1975). Both Goodridge and Monk have a factual predicate substantially different from the one at bar. In Goodridge, the juror initially stated that she could consider the penalty but later in a note indicated that she had some qualms about

imposing the penalty. In the case at hand, however, Mr. Correll could not even state whether he could or could not consider imposing the death penalty.

As pointed out by the petitioner, there are a number of decisions emanating from several states that on their facts support the position taken by the Supreme Court of Kentucky. In Florida, the Supreme Court found that Witherspoon was not violated where the excused venireman replied, "No sir, I wouldn't know. I just wouldn't know," to the question, "If the state proved its case to you beyond a reasonable doubt, could you vote for guilty even though it might mean the electric chair?" Williams v. State, Fla., 228 So.2d 377 (1969), rev. on other grounds, 408 U.S. 941. This case is still cited in Witherspoon-issue cases by the Florida Supreme Court, e.g., Jackson v. State, Fla., 366 So.2d 755 (1978), and Foster v. State, Fla., 367 So.2d 930 (1979).

The Supreme Court in Louisiana reached a similar conclusion in the post-Furman case of State v. Ross, La., 343 So.2d 722 (1977). There the juror "did not know what his position was." In finding his exclusion proper, the Court stated, "We are not convinced that it is improper to excuse a juror for cause where, as here, the juror is unwilling to assure the court that he can be neutral with respect to penalty." Id. at 727.

The Oklahoma Court has also recently upheld the excusing of veniremen who were unsure of their ability to assess the death penalty in Daniels v. State, Okla. Crim., 558 P.2d 405 (1977). As these cases demonstrate, the excusing of Mr. Correll, who could not give an answer as to whether he could consider the imposition of the death penalty, is not a violation of Witherspoon.

The issuance of a writ of certiorari is a discretionary act on the part of this Court. The petitioner has failed to demonstrate that the issue presented on his petition is of such major importance as to warrant this Court's review or relatively minor conflicts of interpretation among the various courts of last resort. The petition should be denied.

III.

CONFLICT AMONG THE VARIOUS STATE AND FEDERAL COURTS AS TO WHETHER THE AVAILABILITY OF AN UNUSED PEREMPTORY CHALLENGE WOULD RENDER HARMLESS AN IMPROPER EXCUSAL OF A JUROR IS NOT OF SUCH A MAGNITUDE OR IMPORTANCE AS TO WARRANT A REVIEW OF THE OPINION BELOW.

Rule 17.1.(c) states:

> "(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court."

In an effort to meet the requirement of this rule, the petitioner argues that the opinion of the Supreme Court of Kentucky which held that the Witherspoon error, if it was error, was harmless beyond a reasonable doubt, indirectly conflicts with the opinion of this Court as written in Davis v. Georgia, 429 U.S. 123 (1976). The petitioner also asserts that there is a direct conflict among the various state and federal courts as to this issue. Although there is admittedly a conflict of opinion, the conflict is not of such a magnitude as to warrant this Court's review of the issue. Furthermore, the opinion of the court below involves a correct application of the harmless error rule as set down by this Court in Chapman v. California, 386 U.S. 18 (1967).

The court below found that the Commonwealth's Attorney would have exercised his remaining peremptory challenge against Mr. Correll if Mr. Correll had not been excused for cause. Thus, if the court improperly excused the venireman, there was no prejudice resulting from the removal of the venireman. Nevertheless the petitioner asserts that decisions of this Court and of the Fifth Circuit Court of Appeals require a different result.

In answering this argument it is the respondent's contention that Davis v. Georgia, supra, does not compel a different holding. The decision by this Court in Davis v. Georgia did not discuss the possibility of remaining peremptory challenges. The dissenting opinion, however, mentioned that it was unclear whether there was a peremptory challenge remaining In Davis the State had used its 10 statutorily-allotted peremptory challenges. Thus, the impact of unused peremptory challenges in a Witherspoon issue was not before this Court. The issue presented in Davis was simply whether the erroneous exclusion of one juror would be tolerated under the Witherspoon rule.

The petitioner cites various decisions of this Court for the proposition that a case must be reversed when even one venireman is improperly excluded. Petitioner also asserts that this rule is applicable in a case regardless of the number of peremptory challenges left and refers to a number of cases denying certiorari where the court below had asserted as an alternative ground that the error was harmless. At least three of those cases do not clearly show that the number of peremptory strikes remaining had exceeded or equaled the number of jurors allegedly erroneously excused for cause. See Mathis

v. New Jersey, 403 U.S. 946 (1971), rev'g., State v. Mathis, 52 N.J. 238, 245 A.2d 20 (1969); Speck v. Illinois, 403 U.S. 946 (1971), rev'g., People v. Speck, 41 Ill.2d 177, 242 N.E.2d 208 (1968); Wigglesworth v. Ohio, 403 U.S. 947 (1971), rev'g., State v. Wigglesworth, 18 Ohio St.2d 171, 248 N.E.2d 607 (1969). In none of these cases was there any indication that the issue of unused peremptory strikes had been actually before this Court or had been given any consideration.

Furthermore, the impact of unused peremptory strikes on a Witherspoon issue attracted this Court's attention in Moore v. Illinois, 403 U.S. 953 (1971). Certiorari was granted in Moore to consider among other issues, the effect of unused peremptory strikes on erroneous Witherspoon challenges.[3] That question was not resolved in Moore due to the intervening decision of Furman v. Georgia, 408 U.S. 238 (1972). As will be noted below, this Court has consistently refused to consider this precise issue.

Petitioner also argues that the Fifth Circuit Court of Appeals has ruled that under this Court's decisions a Witherspoon violation could not be found to be harmless error. Burns v. Estelle, 592 F.2d 1297 (5th Cir. 1979). See also Jurek v. Estelle, 593 F.2d 672 (5th Cir. 1979); Barlow v. Wainwright, 323 F.Supp. 829 (N.D.Fla. 1971). Respondent submits that the interpretation accorded by the Fifth Circuit Court of Appeals to Davis v. Georgia, supra, restricts the application of the harmless error principle. In Burns, supra,

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3 Certiorari was granted on June 28, 1971, the same day of the summary reversals discussed in the previous paragraph. Thus, it seems clear that this Court did not consider those cases as precluding consideration of this issue.

the Fifth Circuit considered this Court's decisions regarding Witherspoon issues. The Court of Appeals construed Davis v. Georgia, supra, to hold that the exclusion of "one venireman on grounds at variance with the Witherspoon standard was fatal, and this although the State may have gone to trial with one peremptory challenge unexercised." Burns, supra at 1299. As noted previously by the respondent, this Court in its opinion in Davis did not discuss the possibility of peremptory challenges. The dissent merely noted that there may have been peremptory challenges unexercised. This issue was not involved in the decision in Davis and the respondent submits that the Fifth Circuit Court of Appeals' reliance on Davis for this point is unwarranted.[4]

As a final point, this Court has declined to grant a writ of certiorari in cases raising a contention identical to the one now being presented on this petition. See Alderman v. State, 246 S.E.2d 642 (Ga. 1978); cert.den. 439 U.S. 991 (1979); Jones v. State, 256 S.E.2d 907 (Ga. 1979), cert.den. ___ U.S. ___, 99 S.Ct. 694 (1980); and Chambers v. State, 568 S.W.2d 313 (Tex. 1978), cert.den. 440 U.S. 928 (1979).

The petitioner has not sufficiently demonstrated any compelling reason for a review of this issue. Accordingly, the petition should be denied.

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4 The petitioner also notes that the federal district court in Georgia rejected this contention in Alderman v. Austin, ___ F.Supp. ___ (S.D. 1980), appeal pending to the Fifth Circuit Court of Appeals. The Court in Alderman specifically relied on Burns v. Estelle, supra, in making its decision.

IV.

NO SPECIAL NOR IMPORTANT REASONS EXIST WHICH WOULD WARRANT THE GRANTING OF THE WRIT ON THE ISSUE OF THE SEIZURE OF SAMPLES OF PETITIONER'S HAIR, SALIVA AND BLOOD.

A.

The Court Lacks Jurisdiction To Review The Seizure Of Petitioner's Hair And Saliva.

As set forth in respondent's jurisdictional statement, this Court lacks jurisdiction to review the seizure of petitioner's hair and saliva, inasmuch as there was no objection at the trial level and the appellate court relied on state procedural grounds in refusing to review the alleged error.

B.

The Court Below Correctly Decided That The Trial Court Order Permitting The Taking Of Samples Was Reasonable.

The Commonwealth obtained samples of petitioner's hair, saliva and blood only after it had sought and received a court order allowing it to do so. The court order was based on a showing of probable cause through the affidavits of the Commonwealth's Attorney and a State Police Detective. The affidavits both gave the following grounds for obtaining the samples:

> "1. That the Commonwealth needs samples of the defendant's hair, saliva, photographs, finger and hand prints and blood for purposes of completing their investigation into the alleged rape and death of Lisa Jansen;
>
> "2. That the investigation and the ends of justice cannot be served without the above-mentioned items because of the nature of the alleged offenses of rape and murder;
>
> "3. That the purpose of obtaining these items is not to harass or to intimidate the defendant;" T.R. 19, 20.

As the Kentucky Supreme Court held, these affidavits, together with the indictment of petitioner for the rape-murder, furnished a reasonable basis for the taking of the samples, in particular the taking of the blood sample. The Kentucky Supreme Court decision is correct.

Kentucky and federal law hold that an affidavit for a search warrant is sufficient if it supplies reason to believe an offense has been committed and evidence material to the prosecution of the offense may be obtained under the search. Commonwealth for Use and Benefit of City of Paintsville v. Melvin, Ky., 256 S.W.2d 513 (1953); United States v. Ventrusca, 390 U.S. 102, 85 S.Ct. 741, 13 L.Ed.2d 684 (1967). In the case at bar, the affidavits of the prosecutor and detective stated that the evidence was needed due to the nature of the crime. These sworn statements of need taken with the indictment charging petitioner with the rape-murder and the obvious relevance of evidence of the defendant's blood type in a rape prosecution provided the trial judge with probable cause to believe that an offense had been committed and that petitioner's blood/saliva sample would be relevant evidence. The order was based on sufficient evidence.

In reviewing a finding of probable cause to support a search warrant, the reviewing court must allow the magistrate the exercise of common sense judgment. As the Sixth Circuit has stated:

> "In judging probable cause Magistrates are not to be confined by niggardly limitations or by restrictions on the use of their own common sense. United States v. Ventrusca, 390 U.S. 102, 108, 85 S.Ct. 741, 13 L.Ed.2d 684 (1967).
>
> * * *
>
> "Great deference, even in doubtful cases must be given by courts to the determination

of magistrates, United States v. Ventrusca, 380 U.S. at 109, 85 S.Ct. 741.

* * *

> "The affidavit for a warrant must be interpreted in a common sense and realistic fashion. The elaborate specificity once required under common-law pleadings is not required. United States v. Ventrusca, supra, 380 U.S. at 108, 85 S.Ct. 741. The Magistrate has the same right as a Court to take judicial notice." United States v. Sevier, 539 F.2d 599 (6th Cir. 1976).

The trial judge in the case at bar can be considered to have used his common sense in reading the affidavits. The common sense encompassed knowledge of the affidavit and of the materiality of blood type as evidence in a rape prosecution. This common sense combined with the statements in the affidavits by the detective and the prosecutor that the evidence was needed for the investigation of the rape and death because of the "nature" of the offenses was sufficient to find probable cause. The Kentucky Supreme Court decision was correct.

C.

The Decision Of The Kentucky Supreme Court Is Not In Conflict With Decisions Of This Court Or Other Courts.

The Kentucky Supreme Court decision upholding the trial court order is not in conflict with decisions of this Court or other courts. Indeed, express support for the Kentucky decision can be found in this Court's decision in Schmerber v. California, 384 U.S. 757, 770, 86 S.Ct. 1826, 1835, 16 L.Ed.2d 908 (1966). In establishing the principle that the Fourth Amendment applies to the taking of blood, this Court stated,

> "Although the facts which established probable cause to arrest in this case also suggested the required relevance and likel success of a test of petitioner's blood for

> alcohol, the question remains whether the arresting officer was permitted to draw these inferences himself, or was required instead to procure a warrant before proceeding with the test." Schmerber, 384 U.S. at 770, 86 S.Ct. at 1835.

In the case at bar, the indictment and the facts in the affidavit suggested the required relevance and likely success of petitioner's blood and saliva as evidence. The detective did not draw the inferences himself. He went to the trial judge for an order. The trial judge issued the order. The taking of petitioner's blood and saliva was not an unreasonable search and seizure.

Nor does the Kentucky decision conflict with United States v. Allen, 330 F.Supp. 1041 (E.D. Pa. 1972), cited extensively by petitioner. There, in ruling the Allen affidavit insufficient, the court stated what it would consider to be necessary for a finding of probable cause for the taking of samples of hair, blood and X-rays. It stated:

> "It is sufficient if there is probable cause to believe that the hair, blood and X-rays the Government seeks would be evidence of a crime against the United States. The Government's motion as currently written fails to establish this probable cause.
>
> "While the existence of the indictments in this case might as a matter of law furnish probable cause to believe that on May 13, 1971 the Fidelity Bank of Folcroft was robbed by two men with handguns, and that defendants were those two men, it nowhere establishes that the requested blood, hair or X-rays are evidence of that crime." Id. at 1044.

The Allen standard can be applied to show probable cause in the case at bar. The existence of the indictment furnished probable cause to believe that a crime had been committed and the petitioner had committed it; the affidavits established that the requested blood and saliva would be evidence of that crime because of the nature of the crime

itself -- the nature of the crime being rape in the case at bar as opposed to robbery in Allen. Probable cause was shown. The Kentucky Supreme Court decision is correct.

Nor do the other two cases relied on by petitioner, Mills v. State, 345 A.2d 127 (Md.Ct.Sp.Ap. 1975), and People v. Marshall, 244 N.W.2d 451 (Mich.Ct.App. 1976), require review of the Kentucky decision. In Mills, the decision rested on failure of the prosecutor's motion to meet the state's warrant requirements, apparently because it lacked any supporting affidavits. In Marshall, the affidavits were found sufficient. The Kentucky decision is correct. The petition should be denied.

D.

The Import Of The Evidence Was Not Such As To Warrant Review.

Even if this Court should decide that the samples were not taken in compliance with Fourth Amendment protections, the petition should not be granted. The evidential import of the samples was not such as to warrant review. At trial, no evidentiary use was made of Gall's hair samples. As for the blood sample, an expert witness testified merely that the type of semen found in the car and on the victim's clothing was consistent with a person of Gall's blood type having had intercourse with the victim. T.E. 1764. He also testified that such semen type was not inconsistent with several other blood types having had intercourse with the victim. T.E. 1776. On appeal, petitioner argued to the Kentucky Supreme Court that such evidence was so inconclusive as to have violated his due process rights through its admittance. Clearly, such "inconclusive" evidence was not of such import at trial to warrant this Court's review of the issue.

Further, the "inconclusive" evidence may be contrasted with "conclusive" evidence that petitioner did commit the crime. Tire tracks at the scene matched the tires on his car; carpet fibers from the victim's clothing matched carpet fibers from his car; the bullets which killed the victim matched the bullets from his gun. Indeed, defense counsel relied on a defense of insanity rather than a defense of innocence. The import of the samples was not such as to warrant review. The petition should be denied.

E.

Stone v. Powell Does Not Require Review Of This Decision.

Petitioner argues that this Court should review the seizure of body samples because habeas corpus review is foreclosed under Stone v. Powell, 428 U.S. 469 (1976). Stone is a limitation on review of state court decisions through habeas corpus. It is not an expansion of review of state court decisions through petitions for certiorari. Stone does not expand this Court's jurisdiction to grant review on certiorari; this Court lacks jurisdiction to review the question of the seizure of saliva and hair samples because of the failure to object at trial level and the reliance on that state procedural ground by the appellant court. Stone does not expand the considerations for granting review on certiorari contained in Rule 17; petitioner has not demonstrated sufficient reasons under Rule 17 to review the question of the seizure of Gall's hair, saliva and blood samples. The petition should be denied.

Lastly, petitioner argues for review on the basis of an alleged "insensitivity" of the Kentucky Supreme Court to Fourth Amendment claims. That very argument is answered in Stone, 428 U.S. at 493, footnote 35.

Further, petitioner's claim of insensitivity is not supported by a single citation to a case wherein a recent Fourth Amendment decision by the Kentucky Supreme Court was overturned by this Court. Indeed, Rawlings v. Commonwealth, Ky., 581 S.W.2d 348 (1979), cited by petitioner, was affirmed by this Court. Rawlings v. Kentucky, 448 U.S. ___, 100 S.Ct. 2566, 65 L.Ed.2d 633 (1980). The Kentucky decision is correct. The petition should be denied.

CONCLUSION

For the reasons stated in the respondent's brief, the petitioner's application for writ of certiorari should be denied.

Respectfully submitted,

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